TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 61.

THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JUNE 5, 1900.

(10,572.)

(18,572.)

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(*Petition for Certiorari.*)

STATE OF MICHIGAN:

In the Supreme Court.

To the honorable supreme court of the State of Michigan:

Your petitioner, The Grand Rapids and Indiana Railway Company, respectfully shows:

1. That on the 13th day of July, 1901, Chase S. Osborn, commissioner of railroads of the State of Michigan, filed in the circuit court for the county of Kent, his petition, praying that a writ of mandamus issue against your petitioner as therein stated. That a copy of said petition is hereto annexed marked Exhibit A.

2. That on filing said petition and on the 13th day of July, 1901, an order that your petitioner show cause, was made by Hon. Alfred Wolcott, judge of the said circuit court. That a copy of said order marked Exhibit B is hereto annexed.

3. That by consent the proceeding was adjourned from July 26th to August 9th.

4. That on the 9th day of August, 1901, your petitioner filed in the said circuit court, its answer to the said petition of the commissioner of railroads. That a copy of said answer is annexed hereto marked Exhibit C.

5. That on the said 9th day of August on the filing of said answer, the further proceedings were had in said circuit court, as shown by the transcript by the official stenographer of said court of his notes of said proceeding. That a true copy of said transcript is annexed hereto marked Exhibit D.

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6. That thereupon and on the 14th day of August, 1901, the attorney general of said State filed a demurrer to the answer of your petitioner. That a copy of said demurrer marked Exhibit E is annexed hereto.

7. That the said cause upon said petition, answer and demurrer was submitted to the court on briefs. That on the 25th day of September, 1901, the said circuit court made an order, which was dated as of the 9th day of September, that a peremptory writ of mandamus issue, directed to your petitioner. That a copy of the said order is annexed hereto marked Exhibit F.

8. Your petitioner respectfully avers, that the said circuit court for the county of Kent, in and by its said order entered on the 25th day of September, dated on the 9th of September, erred in finding, deciding, ordering and adjudging.

(1.) That the respondent in said proceeding, The Grand Rapids and Indiana Railway Company, now your petitioner, entered into a contract with the State of Michigan to carry passengers at the rate fixed in subdivision nine, section 9 of article III of the so-called general railroad law.

(2.) That the said demurrer interposed in said proceeding to your petitioner's answer, should be sustained.

(3.) That a peremptory writ of mandamus issue as prayed, directed to the said respondent in said proceeding, commanding it forthwith and thereafter to issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, at the rate of two and one-half cents per mile for all distances exceeding five miles.

(4.) That the relator recover from the respondent in said proceeding his costs to be taxed.

9. Your petitioner further avers, that the said order dated September 9th is against the just and legal rights of this respondent and was made without authority of law and contrary to the law and deprives your petitioner of its rights under the Constitution of the United States and operates and will operate to deprive your petitioner of its property and of its just rights in and to its property, without due process of law, and deprives your petitioner of the right to charge and receive adequate and reasonable compensation for the use of its property and for carrying persons thereon, and imposes upon your petitioner a rate which is unreasonable, inadequate and unjust, and which will reduce its earnings to such an extent as to practically leave it no profit for the operation of its railroad, and will deprive your petitioner of reasonable earnings and compensation for the use of its property, and deprives your petitioner
3 of the equal protection of the laws, and is a regulation of commerce between the States, and that your petitioner is aggrieved by the said decision and order of the said circuit court dated September 9th, 1901.

That the statute of Michigan on which said order is based is in violation of the provisions in the Constitution of the United States, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and which gives to Congress the power to regulate commerce among the several States.

10. Your petitioner therefore prays that a writ of certiorari may be issued out of and under the sea- of this honorable, court, directing the judges of the circuit court for the county of Kent and requiring them on or before a certain date named therein to certify to this court the records, proceedings, pleadings, orders and exhibits in said cause, and that the order of the said circuit court for the county of Kent, dated September 9th, 1901, be reversed, set aside and held void, and that a stay of proceedings and such further order be made by this honorable court as may seem proper.

THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY,
By T. J. O'BRIEN, *Its General Counsel.*

T. J. O'BRIEN,
Attorney for Petitioner.

STATE OF MICHIGAN, } ss:
County of Kent, }

T. J. O'Brien, being duly sworn, deposes and says that he is one of the directors and is the general counsel of The Grand Rapids and Indiana Railway Company, the petitioner in the foregoing petition; that deponent has read said petition and knows the contents thereof; that he was attorney for the petitioners in the proceedings in the circuit court for the county of Kent therein set forth; that he is authorized to sign the said petition for and in the name of the said petitioner, and that the foregoing petition is true in substance and in fact, as he verily believes.

T. J. O'BRIEN.

Subscribed and sworn to before me this 23rd day of October, A. D. 1901.

JAMES B. HOWARD,
Notary Public in and for Kent County, Michigan.

4 (A.) *Petition for Mandamus.*

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

To the circuit court for the county of Kent:

Your petitioner, Chase S. Osborn, commissioner of railroads of the State of Michigan, acting for and in behalf of such State, respectfully shows:

1. That the Grand Rapids and Indiana Railway Company is a corporation organized and existing under the general railroad law of this State, being act No. 198 of the session laws of 1873, as amended, having been reincorporated thereunder in 1896, and owning and leasing and operating a line of road lying partly in the lower peninsula of the State of Michigan, and partly in the State of Indiana, for the transportation of freight and passengers; and that of its said line of road about 439.40 miles is in the State of Michigan, consisting of about 376.55 miles of road from the Indiana State line to Mackinaw City, Michigan, with branches owned by it, and 36.85 miles leased from the Muskegon, Grand Rapids and Indiana Railroad Company, and 26 miles leased from the Traverse City Railroad Company.

2. That under and by virtue of act No. 79 of the session laws of 1873, as amended, it became and was the duty of the said Grand Rapids and Indiana Railway Company, on or before the first day of April, A. D. 1901, to make and transmit to your petitioner as commissioner of railroads, at his office in Lansing, Michigan, a full and true statement under oath of the affairs of said corporation on the 31st day of December preceding. That in the performance of the duty imposed upon it by said act the said Grand Rapids and In-

diana Railway Company, did under the oath of its vice president and auditor, make and transmit to your petitioner, the commissioner of railroads of the State of Michigan, a statement of its affairs on the said 31st day of December, 1900, which was received on the 5th day of April, 1901; which said report and statement indicated and set forth (pages 14 and 15) the gross earnings of its passenger trains per mile of road operated as follows:

Main line and branches	$2,330.74
Leased or proprietary roads:	
Muskegon, Grand Rapids and Indiana R. R.	2,173.26
Traverse City railroad	1,088.52
Total passenger department earnings (per mile of road)...	2,243.24

3. That after the receiving of said report and statement, and upon the 11th day of July, 1901, your petitioner, acting under and by virtue of the authority and the duty imposed upon him by said subdivision ninth of section nine, of article 2 of the general railroad law of this State, as amended, by a notice in writing addressed to its general manager, J. H. P. Hughart, at Grand Rapids, Michigan, notified the said
5 Grand Rapids and Indiana Railway Company that as the gross earnings of its passenger trains per mile of road operated by it within this State exceeded the sum of two thousand dollars, it would thereafter be allowed and required to receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, over any portion of the line of road operated by it in this State, a sum not to exceed two and one-half cents per mile for distances exceeding five miles; a copy of which said notice is hereto attached, marked Exhibit A and made a part of this petition.

4. That upon and after receiving said notice as aforesaid, it became, was and now is the legal duty of the said Grand Rapids and Indiana Railway Company to reduce its rate of fare over any and every portion of the line of road operated by it within the State of Michigan for the transportation of any passenger and his or her ordinary baggage not exceeding in weight 150 pounds, to two and one-half cents per mile for distances exceeding five miles, and to thereafter sell tickets to all persons applying therefor, and to transport any person and his or her ordinary baggage, not exceeding in weight 150 pounds, for distances exceeding five miles, at the said rate of two and one half cents per mile. That notwithstanding said notices and said legal duty imposed upon the said Grand Rapids and Indiana Railway Company thereby, it refused and neglected, and still continues to refuse and neglect, to transport passengers at the rate required by law; but charges and insists upon receiving the sum of three cents per mile for all distances for the transportation of passengers over the said line of road operated by it within this State.

That your petitioner has no other specific legal remedy, and can-

not have adequate legal relief without the aid of the people's writ of mandamus, by the interposition of this honorable court.

Your petitioner therefore prays that an order be entered compelling the said Grand Rapids and Indiana Railway Company to show cause why a peremptory writ of mandamus should not be issued, compelling it to comply with the provisions of said subdivision ninth of section 9 of article 2 of the general railroad law of this State, as amended by act No. 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued, tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight 150 pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles; and that such other and further order may be entered as to the court shall seem proper.

CHASE S. OSBORN,
By CHARLES H. CHAPMAN,
Deputy Commissioner of Railroads.

HORACE M. OREN,
Attorney General, for Petitioner.

6 STATE OF MICHIGAN, } ss:
County of Ingham, }

On this 12th day of July, 1901, personally appeared before me the undersigned, a notary public within and for said county, Charles H. Chapman, who made oath that he is deputy commissioner of railroads of the State of Michigan; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

ARTHUR N. FRAME,
Notary Public, Wayne Co., Mich.,
Acting in Ingham Co., Mich.

(EXHIBIT A TO PETITION OF RAILROAD COMMISSIONER.)

JULY 11, 1901.

Mr. J. H. P. Hughart, gen'l manager G. R. & I. R'y Co., Grand Rapids, Mich.

DEAR SIR: It is noticed by the annual report of your company for the year ending December 31, 1900, that on pages 14 and 15 of such report the total earnings of its passenger trains are given as $976,843.87, or $2,243.24 per mile of road. This brings the company under the provisions of section 6234, compiled laws of 1897, and requires that its rates of passenger fare be reduced to 2½ cents per mile. The statute provides that the compensation for transport-

ing any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed 2½ cents per mile, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads, equal or exceed $2,000 per mile. You will therefore please take notice that your company is hereby required to reduce its rates of passenger fares as required by law.

Very respectfully yours,

CHASE S. OSBORN,
Commissioner of Railroads.

7 (B.—*Order to Show Cause.*)

At a session of the circuit court for the county of Kent, held a the court room in the city of Grand Rapids, in said county, on the 13th day of July, in the year of our Lord one thousand nine hundred and one.

Present: Hon. Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

On reading and filing the petition of the relator above named, and on motion of Horace M. Oren, attorney general of the State of Michigan, attorney for relator:

It is ordered that the respondent, The Grand Rapids and Indiana Railway Company do show cause to this court on the 26th day of July, 1901, why a peremptory writ of mandamus should not be issued out of and under the seal of this court, to compel it, the said Grand Rapids and Indiana Railway Company, to comply with the provisions of subdivision ninth of section 9 of article 2 of the general railroad law of this State, as amended by act No. 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued, tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight 150 pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles.

And it is further ordered that a certified copy of this order, together with a copy of the petition aforesaid, upon which this order is founded, be served on the said respondent, The Grand Rapids and Indiana Railway Company, at least ten days before the time herein limited for showing cause; and that a copy of the said respondent's affidavits or return in response to this order be served upon the relator's attorney at least three days prior to the time limited for showing cause.

ALFRED WOLCOTT,
Circuit Judge.

8 STATE OF MICHIGAN, } ss:
County of Kent, }

I, Connor H. Smith, clerk of the circuit court for the county of Kent, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript thereof and of the whole of said original order.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court at the city of Grand Rapids in said county, this 13th day of July, 1901.

CONNOR H. SMITH, *Clerk,*
By RALPH A. MOSHER, *Deputy.*

9 (C.—*Answer of Respondent.*)

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

Mandamus.

Answer of the respondent to the petition of the relator filed in said court and to the order to show cause.

The said relator having on the 13th day of July, 1901, filed in this court his petition, verified on the 12th day of July, 1901, praying that an order be entered compelling the said respondent to show cause why a peremptory writ of mandamus should not be issued compelling it to comply with the provisions of subdivision nine of section nine in article II of the general railroad law of said State, as amended by act number 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles, and said court having on the 13th day of July, 1901, on reading and filing said petition, made an order requiring this respondent to show cause to said court on the 26th day of July, 1901, why a peremptory writ of mandamus should not be issued, as prayed in said petition, the said respondent files this, its answer to said petition, and submits the same as showing sufficient cause why a writ of mandamus should not be issued as prayed by the relator.

I.

1. The entire constitutional and statute law of the State of Michigan on the subject of tolls and compensation, to be charged and received by railway companies, is contained in article XIX A of the constitution, and in section 9, subdivision ninth of article II of act 198 of the laws of 1873, entitled, "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State," as amended by act 202 of the laws of 1889.

These provisions are as follows:

Constitution, article XIX A. "The legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State" (adopted 1870, took effect January 1st, 1871).

"SEC. 9. Every such corporation shall possess the general powers and be subject to the liabilities and restrictions following, that is to say:

Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile and for all companies the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: Provided, that in future whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile as hereinbefore provided: Provided, that roads in the upper peninsula in which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile

hall be allowed to charge not to exceed four cents per mile: Provided further, that one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of this State, at a price not exceeding twenty dollars in the lower peninsula and twenty-five dollars in the upper peninsula. Such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company. Each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

The said section 9 in article II has been amended several times since 1889 in other subdivisions, but the ninth subdivision has not been changed since 1889 and now remains as then amended. It is the same statute referred to in the petition for mandamus in this proceeding as act 90 of 1891.

2. The supreme court of the State of Michigan is, under the constitution of the State, the highest court and the court of final resort in the State.

Two cases only have come before the supreme court of the State arising upon said statute: Wellman *vs.* The Chicago and Grand Trunk Railway Company, decided December 24, 1890, reported 83 Mich., 592, and The Commissioner of Railroads of the State of Michigan *vs.* The Wabash Railway Company, decided April 4, 1900, reported 123 Mich., 669, in which a supplementary opinion was filed March 26, 1901, reported 85 Northwestern Reporter, 466 and '7, Detroit Legal News, 748.

In these cases the supreme court of the State upheld this statute and construed it and enforced it against the respective railway companies above named.

In the Wellman case the supreme court of Michigan quoted, considered and construed the said constitutional and statutory provisions and decided that under said constitutional provision the legislature was the exclusive and final judge of what were reasonable maximum rates of charges for the transportation of passengers on all railroads in the State of Michigan, and that the action of the legislature of the State in fixing maximum rates of such charges was final and conclusive upon the companies and the courts and that the reasonableness of such rates as fixed by the act of the legislature was not subject to review or inquiry by the courts or else-

where, and that the companies were precluded from showing that such rates so fixed were unreasonable in any case.

3. The said constitutional provision and statute as so construed and enforced by the supreme court of the State is in violation of the provision in the Constitution of the United States in section 1 of article XIV of the amendments, that no State shall deprive any person of property without due process of law.

4. The said constitutional provision and statute in the laws of Michigan are in violation of the said provision in the Constitution of the United States and void under the decision of the Supreme Court of the United States in the case of The Chicago, Milwaukee and St. Paul Railway Company *vs.* The State of Minnesota (134 U. S., 418), in which the Supreme Court of the United States decided that the statute of the State of Minnesota under consideration in that case, as construed by the supreme court of Minnesota, conflicted with said provision in the Constitution of the United States, for the reason that it deprived the railway company, the party in said suit, "of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice," and that, "if a railway company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States, and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws," and that the issue of the peremptory writ of mandamus in that case by the supreme court of the State of Minnesota was unlawful because in violation of the Constitution of the United States.

5. The said constitutional provision and statute in the State of Michigan are in violation of the said provision in the Constitution of the United States, as construed, interpreted and enforced by the Supreme Court of the United States in the said Minnesota case and in other decision of said court forming part of the law of the land.

6. There is no difference or distinction in theory or principle between the act of the railway commission of Minnesota made final by the statute of Minnesota and condemned as unconstitutional by the Supreme Court of the United States in the said Minnesota case and the act of the legislature of the State of Michigan itself held to be final by the supreme court of the State of Michigan as aforesaid and the said act of the legislature of Michigan is as fully in violation of said provision in the Constitution of the United States as the said statute of Minnesota, which was condemned as unconstitutional by

the Supreme Court of the United States in said Minnesota case. The thing condemned was the assume- power to arbitrarily and finally fix rates without a hearing of the companies affected, not the mere method of the exercise of such power, whether by the legislature or by a commission appointed by act of the legislature.

13 The said statute in its terms and as construed by the supreme court of the State, imposes upon railway companies the said rate of two and one-half cents per mile for said transportation, arbitrarily and finally without any inquiry or proceeding to ascertain or determine whether such rate in any case is reasonable or not, and without any provision for such inquiry and without any opportunity for a company in any case to show that in fact such rate would be inadequate and unreasonable compensation for such transportation.

The courts of the State enforce said statute against railway companies, as the supreme court of the State did in said Wabash case by peremptory writ of mandamus, based upon the statute itself and a report by the company that the earnings of its passenger trains in any year exceeded $2,000 and did not exceed $3,000 per mile, and notice by the commissioner of railroads to the company to reduce its fares to two and one-half cents, and without any inquiry, trial or hearing as to the reasonableness of such rate as matter of fact in any case, and without any opportunity for the company in any case to show that such rate would be unreasonable.

The said statute and the said construction and effect given to it by the supreme court of the State and the enforcement thereof by the courts in the manner stated, is in violation of the provision in the Constitution of the United States in section 1 of article XIV of the amendments, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

III.

This respondent avers that the said rate, two and one-half cents per mile for transporting passengers and their baggage, according to said statute, is and would be inadequate, unreasonable and unjust, and would not be adequate or reasonable compensation for such transportation upon the railroad of this respondent. That the enforcement of said rate upon this respondent would reduce its earnings to the extent of seventy five thousand dollars ($75,000) and upwards per year (computed upon the earnings of 1900), and would deprive it to said extent of moneys and income to which it would be fairly and reasonably entitled from the use of its property for the transportation of persons and their ordinary baggage.

That the said statute of the State of Michigan, as construed and enforced by the courts of said State as aforesaid, imposes said rate upon this respondent arbitrarily and finally without any trial, hearing or inquiry as to the reasonableness of said rate applied to the

business of this respondent, and without any opportunity for
14 this respondent to be heard and to show as it can and would show, if heard, that said rate would be inadequate and unreasonable compensation for said service, and without any provision in the law of the State for such hearing, and with this respondent precluded under said law, as construed by the courts, from being heard at all in the matter, and from showing that such rate would be inadequate, unreasonable and unjust when applied to the business of this respondent, and that the courts of the State, in enforcing and giving effect to said statute, if adhering to their decisions, would not consider the question whether or not such rate is or would be reasonable in any case, and would not hear this respondent on that question, and would not allow it to show that the said rate would be inadequate and unreasonable for such transportation upon its railroad.

That such enforcement of said rate upon this respondent in such manner and under such circumstances and conditions and with the effect herein stated, would be depriving this respondent of its property without due process of law, and would be a violation of the said provision of the Constitution *in* the United States, which forbids any State to deprive any person of property without due process of law.

IV.

That the said rate of two and one-half cents per mile for transporting passengers and their baggage, according to the terms of said statute, as construed by the supreme court of the State, would be an inadequate and unreasonable compensation to this respondent for said transportation.

1. It would reduce materially and to a great extent, and not less than seventy-five thousand dollars ($75,000) per year (computed on the business of 1900), the gross earnings of this respondent from the operation of its railroad, which do not now and have not at any time in the past, yielded to this respondent a fair income and profit upon the capital invested by this respondent in its railroad property, over and above the expense of operation, economically conducted.

2. Only part of the travel on the railroad of this respondent would be subject to the two and one-half cents per mile rate under said statute, if enforced, that is, local travel wholly within the State of Michigan, between points in said State. This travel requires to a considerable extent, special and expensive service in local trains. The cost of said service economically conducted is such that two and one-half cents per mile for transporting persons and their baggage therein, according to said statute, would be inadequate and unreasonable compensation for such service, and would in many instances be less than the actual cost of running the trains to afford such transportation.

The enforcement of said rate upon this respondent would be unreasonable and unjust and such enforcement arbitrarily and without inquiry or hearing, and without opportunity for this respondent

to show that the said rate would be inadequate and unreason-
15 able, would be to unjustly and unreasonably deprive this respondent of its said earnings and of reasonable compensation for said transportation, in violation of said provision in the Constitution of the United States, that no State shall deprive any person of property without due process of law.

V.

The said statute of Michigan, as construed by the supreme court of the State, operates as a regulation of commerce among States in violation of the provision in the Constitution of the United States, which vests in Congress entire and exclusive power to regulate commerce among the States (article I, section 8, clause 3).

This respondent is a corporation organized under the laws of the States of Michigan and Indiana. It owns and operates a railroad running from Fort Wayne, in the State of Indiana to the straits of Mackinaw, in the State of Michigan. Said railroad is an inter-state road, and this respondent is engaged in inter-state commerce and subject to the laws of the United States, regulating such commerce. A large part of the earnings of this company is derived from inter-state commerce, that is, from the transportation of persons and express matter and the United States mails on continuous trips upon its railroad, in both States, from points in Michigan to points in Indiana, and *vice versa*.

The supreme court of Michigan in the Wabash case (in the said opinion filed March 26th, 1901), decided that in determining what domestic fares shall be (that is the maximum of rates to be charged by companies tor transporting persons and their baaggage within the State of Michigan under said statute), the amount of interstate fares earned by that portion of the road lying within the State of Michigan must be included in the earnings to determin- the rates which the companies may charge under such statute.

The said statute of Michigan, so construed, is a regulation of inter-state commerce and a restriction upon such commerce in violation of said provision in the Constitution of the United States (article I, section 8, clause 3).

This respondent avers that excluding the so-called Michigan proportion of the earnings of its passenger trains in inter-state business, the earnings of its passenger trains in 1900 would be much less than $2,000 per mile of road operated.

VI.

This respondent avers that two and one-half cents per mile for the transportation of persons and their baggage, not exceeding one hundred and fifty pounds in weight for each person for all distances over five miles, upon the railroad of this respondent, would not be adequate or reasonable compensation for such transportation, and that the enforcement of such rate upon this respondent would be unreasonable and unjust, and would not allow this respondent sufficient compensation for such transportation.

16 Your petitioner prays that the court will in this proceeding order an issue of fact to be framed for the trial of this question, and that the decisions of the courts of this State holding that the said act of the legislature, expressed in said statute, is final and conclusive and precludes railway companies from being heard as to the reasonableness of the rates fixed by said act, be reconsidered, reheard and overruled, and that the question of the adequacy and reasonableness of the said rate for the transportation of persons and their baggage, as aforesaid upon the railroad of this respondent, be tried, heard and determined by the court in this proceeding, and if it be found and determined that such rate would not be adequate or reasonable for such transportation, that the petition herein filed be dismissed.

VII.

Answering the statements of fact in the petition for mandamus in this proceeding, this respondent respectfully shows:

1. This respondent is a railway corporation, organized under the general laws of the State of Michigan and Indiana.

2. It was incorporated and organized in 1896 as a new and independent company and not as the re-organization as stated in said petition of a former corporation.

3. In 1896 it acquired by purchase the property known as the Grand Rapids and Indiana railroad, theretofore owned and operated by another corporation, and this respondent then succeeded to all the property rights and all the franchises of the said former company, pertaining to said property.

4. The cost to this respondent of the property in August, 1896, was $15,278,700.

5. The said property consists of the main line of railroad, extending from Fort Wayne in the State of Indiana, northerly through the State of Indiana and the lower peninsula of the State of Michigan to Mackinaw City on the straits of Mackinaw. The length of said railroad is 366.59 miles, of which 53.11 miles are in the State of Indiana. There are connected with said main line and owned by your petitioner ten short branch lines, all in the State of Michigan, the total length of which is 63.07 — (3.94 miles thereof *was* built in 1900, but not operated that year). The railroad property owned by this respondent consists of the said main line and branch lines of railroad rights of way, road-bed, station grounds, station buildings and other appurtenances.

This respondent owns rolling stock and equipment for the operation of said railroad, consisting of locomotives, passenger cars, freight cars and other cars, the value of which is $1,452,750.

17 6. There is outstanding indebtedness in the form of bonds, secured by mortgages on said railroad property, to the amount of $9,337,000, created as follows:

October 1st, 1869, time of payment now extended to July 1st, 1941	$5,375,000 00
August 1st, 1896, bonds issued due October 1st, 1936	3,962,000 00
Total	$9,337,000 00

$4,455,000 of said debt due July 1st, 1941, bears interest at four and one-half per cent.; $920,000 of said debt, due July 1st, 1941, bears interest at three and one-half per cent., and the said debt due October 1st, 1936, bears interest at four per cent.

The total annual interest on said indebtedness is $391,155.

This respondent has operated in connection with its said railroad, two lines of railroad in the State of Michigan, namely: the Muskegon, Grand Rapids and Indiana railroad, extending from the city of Grand Rapids to the city of Muskegon in the State of Michigan, 36.85 miles; and the Traverse City railroad, extending from Walton to the city of Traverse City, a distance of twenty-six miles. This respondent has never leased said lines but has operated the same in connection with its own railroad under arrangements with the companies owning said two lines, by which this respondent has operated the same and turned over to the other companies the surplus of earnings, over and above operating expenses. This respondent has not at any time derived any net income or earnings from said two lines, or either of them.

7. The total earnings from the operation of the said railroad of this respondent, and the said Muskegon and Traverse City roads for the year 1900, *was* $2,862,069.36.

The surplus of earnings over and above operating expenses, interest on debt and other charges, were as follows:

Of the Grand Rapids and Indiana railroad	$83,475 11
Of the Muskegon road	3,095 89
Of the Traverse City road	4,220 54

The capital stock of this respondent, authorized by its charter and the articles of association is $6,000,000. There *has* been issued and *is* now outstanding and owned by diverse persons, $5,791,700 in 57,917 shares of one hundred dollars each.

8. The said total earnings aforesaid, include all earnings from passenger and freight traffic, as follows:

Freight	$1,722,408 85
Passenger fares	978,881 92
Express and baggage	57,477 11
United States mails	59,183 43
Miscellaneous	6,753 06
From telegraph companies	9,687 85
Rent of tracks, yards and terminals	13,214 30
Other rents	1,866 49
Other sources	12,596 35
Total	$2,862,069 36

18 9. The reduction of passenger fares to two and one-half cents per mile would reduce the passenger earnings of this respondent as nearly as can be computed, $78,489 per annum. The effect of this computed on the basis of the business of 1900 in which the earnings were greater than in any former year, would be to very nearly leave no surplus whatever and would practically make the stock of this respondent worthless.

10. That the said earnings of passenger trains are made up as follows:

(1) Main line and branches:

Passenger fares	$885,474 87
Express and baggage	50,002 47
U. S. mails	52,667 91
Other sources	5,763 94
Total	$993,909 19
Per mile of road (427.17 miles)	2,326 73

(2) Muskegon, Grand Rapids and Indiana railroad:

Passenger fares	$69,728 80
Express and baggage	4,527 53
U. S. mails	4,848 99
Other sources	979 40
Total	$80,084 72
Per mile of road (36.85 miles)	2,173 26

(3) Traverse City railroad:

Passenger fares	$23,678 25
Express and baggage	2,947 11
U. S. mails	1,666 53
Other sources	9 72
Total	$28,301 61
Per mile of road (26 miles)	1,088 52

The totals are as follows:

For the three roads:

Passenger fares	$978,881 92
Express and baggage	57,477 11
U. S. mails	59,183 43
Other sources	6,753 06
Total	$1,102,295 52
Per mile of road (490.02 miles)	2,249 49

11. That the figures given in the last paragraph are the earnings of the entire main line from Ft. Wayne to Mackinaw City and of the Muskegon and Traverse City roads; that all of the last two roads are in Michigan. That the Michigan earnings of the 19 main line, including the Michigan proportion of inter-state business based on mileage, *is* as follows:

Passenger fares	$773,512 94
Express and baggage	43,549 94
U. S. mails	45,940 94
Other sources	5,453 72
Total	$868,457 54
Per mile of road	2,330 74

12. That the item, "other sources" in the last two paragraphs, cover- check room charges and similar small items.

13. That the statements of fact in said petition are contained in paragraphs numbered 1, 2, 3 and 4.

As to paragraph 1, this respondent says that the facts as to its incorporation and railroad are not correctly stated therein, and that the facts are as herein stated.

As to paragraph 2, this respondent admits the matters therein stated, and says that the facts as to its earnings and the matters contained in said report are more fully stated herein than in said paragraph 2 in the petition. That the said report of this respondent was made upon a blank form prepared and sent to it by the commissioner of railroads.

As to the third paragraph, this respondent admits that the relator sent a notice as therein stated, but it denies that in so doing he was acting under or by virtue of any authority or duty imposed upon him by law.

As to paragraph 4, this respondent admits that it does insist upon receiving the sum of three cents per mile for the transportation of every passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, for all distances over and upon the railroad owned and operated by this respondent, excepting the sale of one thousand mile books or tickets, and excepting some special and excursion rates which are offered to all persons caring to avail themselves of such rates, without discrimination.

VII*a*.

That the said railroad was built and in operation before the first day of January, 1873. It was built and owned and operated until June, 1896, by the Grand Rapids and Indiana Railroad Company, a corporation organized under the laws of the States of Michigan and Indiana, in the year 1870. The said last named corporation, on the first day of August, 1884, made a mortgage upon said railroad property to secure its bonds duly issued to the amount of three million (3,000,000) dollars. The said railroad and its appurtenant

property was sold on the 10th day of June, 1896, under decrees of the circuit courts of the United States for the western district of Michigan, and for the district of Indiana, in foreclosure of said mortgage, and purchased by John C. Sims, who thereby became the owner of said property. Thereafter under section 2 in article I of said act 198 of the laws of 1873, the said John C. Sims, with
20 others who associated themselves with him, organized a corporation (this respondent) for the ownership and management of said railroad by a certificate duly signed by them on the 7th day of July, 1896, and recorded in the office of the secretary of state of the State of Michigan, on the 11th day of July, 1896, which certificate is as follows:

"To the honorable secretary of state of the State of Michigan:

Whereas, on the first day of August, A. D. 1884, the Grand Rapids and Indiana Railroad Company, being then a corporation existing under the laws of the States of Indiana and Michigan, formed by the consolidation of certain other railroad companies, under the laws of said States respectively, was the owner of a certain railroad extending from the city of Fort Wayne, in the county of Allen, in the State of Indiana, thence through the counties of Allen, Dekalb, Noble and La Grange, in the State of Indiana, to the State line between Indiana and Michigan; thence northward through the counties of St. Joseph, Kalamazoo, Allegan, Kent, Montcalm, Mecosta, Osceola, Wexford, Grand Traverse, Kalkasak, Antrim, Otsego, Charlevoix and Emmet to Mackinaw City, in the State of Michigan, a total distance of about three hundred and sixty-six and fifty-nine hundredths (366.59) miles; fifty-three and eleven hundredths (53.11) miles of said railway being located in the State of Indiana and three hundred and thirteen and forty-eight hundredths (313.48) miles thereof being located in the State of Michigan, and

Whereas, on said first day of August, A. D. 1884, said railroad company executed a mortgage or deed of trust dated that day, to John E. Davidson, William H. Barnes and Conrad Baker, as trustees, conveying all the said railroad in the said States of Indiana and Michigan, which was known as the Grand Rapids and Indiana railroad, together with certain branches and extensions thereof and certain other lands, properties, rights and franchises, more particularly described hereafter; said mortgage or deed of trust including all the property between said terminal points, which said railroad company owned or possessed on the first day of August, 1884, or which it has since acquired, either in law or in equity, of every kind whatsoever appurtenant thereto; the object of said mortgage or deed of trust being to secure the payment of the principal and interest of the bonds of said Grand Rapids and Indiana Railroad Company, amounting to three million dollars, and

Whereas, afterwards, suits in equity were brought in the circuit courts of the United States for the western district of Michigan and for the district of Indiana, wherein John E. Davidson and William H. Barnes were complainants and the said Grand Rapids and Indiana

Railroad Company and others were defendants, for the pur-
21 pose of procuring a decree of foreclosure upon said mortgage or deed of trust and such proceedings were had in each of said courts, that upon the original bills and answers thereto, and upon the report of the master in chancery, to whom said suits were referred, for the purpose of finding and reporting upon the facts in said suits, a final decree was rendered by the said circuit court of the United States for the western district of Michigan, and also by the said circuit court of the United States for the district of Indiana, the decree of the former court being entered on the 7th day of March, A. D. 1896; and that of the latter court on the 12th day of March, A. D. 1896; and in and by said decrees it was ordered, adjudged and decreed that the said mortgage should be foreclosed and that the property therein mentioned should be sold as an entirety, and in the said decrees the property thereby ordered to be sold was describe- as follows, to-wit:

All and singular the railroad of the Grand Rapids and Indiana Railroad Company, which is known as the Grand Rapids and Indiana railroad, extending from the city of Fort Wayne in Allen county, in the State of Indiana, by way of Grand Rapids in the State of Michigan, to the waters of the straits of Mackinaw, in the village of Mackinaw City, in said State of Michigan, including the dock at the terminus of said railroad, and including also the frontage and the land out into the deep waters of the straits of Mackinaw, being a distance of 366 miles, more or less; including also the Missaukie branch, which extends from Missaukie on the main line, in the county of Wexford, northeasterly to a point near Falmouth, a distance of about eighteen miles, together with the equipment and franchises thereunto belonging or in anywise appertaining, including the roadbed of said railroad and branch, and all the tracks, side-tracks, spur tracks, rights of way, bridges, viaducts, culverts, fences, depots, station grounds, station houses, freight houses, wood houses, machine and other shops, telegraph lines and equipment, and all other structures, buildings and materials whatsoever placed and to be placed on the said rai-road or branch, or any part thereof; and also all locomotives, tenders, passenger, baggage, freight and other cars, and all rolling stock whatsoever heretofore acquired or which at the time of the sale hereunder shall have been acquired by the said Grand Rapids and Indiana Railroad Company for use upon, or in connection with, the said railroad or any part thereof; and also all depot grounds and other lands heretofore acquired, or which at the date of the sale may have been acquired for use in connection with the said railroad and branch, or in the operation thereof; together with all and singular the tenements, property and appurtenances of said railroad and corporation and the rights, privileges and franchises thereunto belonging or in any wise appertaining; and also all the estate, right, title, interest, income and prop-
erty, possession, claims and demands whatsoever, as well at law
22 as in equity, of the said Grand Rapids and Indiana Railroad Company, in, about and concerning the same, and each and

every parcel thereof; also the railroad known as the Bay View, Little Traverse and Mackinaw railroad, extending from near Bay View, in Emmet county, Michigan, in a northerly direction, and terminating at the village of Harbor Springs, in the said county of Emmet, together with all and singular the rights, property and franchises owned heretofore and belonging to the said Bay View, Little Traverse and Mackinaw Railroad Company, including any sidetracks, station houses, station buildings, telegraph line, water tanks, and other property, both real and personal, belonging to said railroad; also all the right, title and interest of the said Grand Rapids and Indiana Railroad Company in and to the Cincinnati, Richmond and Fort Wayne railroad, extending from a point near Fort Wayne, in the county of Allen, State of Indiana, to the city of Richmond, in said State, being a distance of about eighty-five miles, and in the lease or contract dated June 1st, 1871, between the said Grand Rapids and Indiana Railroad Company, the Cincinnati, Richmond and Ft. Wayne Railroad Company, the Cincinnati, Hamilton and Dayton Railroad Company, and the Pennsylvania Company, having reference to the lease and operation of said Cincinnati, Richmond and Fort Wayne railroad by the Grand Rapids and Indiana Railroad Company for the period of ninety-nine years; also, all and sin*u*lar the right, title and interest of the said Grand Rapids and Indiana Railroad Company in and to the railroad known as the Traverse City railroad extending from Walton Junction on the line of the said Grand Rapids and Indiana railroad to Traverse City, in Grand Traverse county, in said State of Michigan, a distance of about twenty-six miles, and in the lease dated January 1st, 1883, made by the said Traverse City Railroad Company to the defendant, The Grand Rapids and Indiana Railroad Company, for the possession and operation of said Traverse City railroad from the date of said agreement until the 1st day of January, 1933.

Including also all the material and supplies belonging to said Grand Rapids and Indiana Railroad Company and on hand at the date of sale used and partly used. Also any balance that may be found due to the said defendant, The Grand Rapids and Indiana Railroad Company on an adjustment between said company and connecting carriers over and above the amount which may be found due from said defendant company to other carriers, and

Whereas, afterwards, to-wit, on the 10th day of June, A. D. 1896, all the property hereinbefore described was sold at public sale, under and in pursuance of each of said final decrees of said courts, by John S. Lawrence, master in chancery, therein named, at which sale the undersigned, John C. Sims, became the purchaser of all said property, and said John C. Sims has since the date of said purchase, associated with himself the other persons whose names are
23 hereunto subscribed, all of whom desire and intend to form a corporation under the laws of the State of Michigan, as hereinafter more particularly set forth; and

Whereas, afterwards, to-wit, on the 2nd day of July, A. D. 1896, the said John S. Lawrence, master in chancery, did by deed exe-

cuted and dated on said day, convey to said John C. Sims, the entire railroad and all the property, franchises and appurtenances which were so sold by him to said John C. Sims, on said 10th day of June, A. D. 1896; the amount paid therefor by said John C. Sims being five hundred thousand dollars ($500,000);

Now, therefore, in pursuance of the statutes of the State of Michigan, in such case made and provided, and especially in pursuance of section two of an act entitled, "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations, owning or operating any railroad in this State;" the same being designated as No. 198 laws of 1873.

We whose names are hereunto subscribe-, do hereby form ourselves into a corporaiton, for the purpose of owning, maintaining and operating the railway and all other property hereinbefore described, and for this purpose, we do hereby declare and certify as follows:

1. The name of said new corporation shall be the Grand Rapids and Indiana Railway Company.

2. The number of directors of said corporation shall be seven.

3. The names of the first directors of said corporation are the following: James McCrea, Pittsburgh, Pa.; J. T. Brooks, Salem, Ohio; John E. Davidson, Pittsburgh, Pa.; Joseph Wood, Pittsburgh, Pa.; W. R. Shelby, Grand Rapids, Mich.; Harvey J. Hollister, Grand Rapids, Mich.; T. J. O'Brien, Grand Rapids, Mich.

4. The period of service of such directors shall be from the filing of this certificate in the office of the secretary of state of Michigan, until the first Wednesday of March, A. D. 1897, and thereafter directors shall be chosen annually on the first Wednesday of March, until otherwise provided in accordance with law.

5. The capital stock of the corporation hereby formed, shall be six million dollars ($6,000,000), consisting of sixty thousand (60,000) shares of the par value of one hundred dollars each, and the same shall be issued as follows:

To John C. Sims, fifty-nine thousand nine hundred and ninety-three (59,993) shares.

To James McCrea, one share; to J. T. Brooks, one share; to John E. Davidson, one share; to Joseph Wood, one share; to W. R. Shelby, one share; to Harvey J. Hollister, one share; to T. J. O'Brien, one share.

In testimony whereof, we have hereunto affixed our hands
24 and seals this 7th day of July, A. D. eighteen hundred and ninety-six.

J. C. SIMS.	[SEAL.]
JAMES McCREA.	[SEAL.]
J. T. BROOKS.	[SEAL.]
JOHN E. DAVIDSON.	[SEAL.]
T. J. O'BRIEN.	[SEAL.]
L. L. GILBERT.	[SEAL.]
S. C. SCOTT.	[SEAL.]

By virtue of the said certificate, this respondent became and now is duly incorporated, and the owner of said railroad property, and has since that date owned, possessed and operated the same.

VIII.

This respondent respectfully insists that it has the right to charge and receive the sum of three cents per mile for the transportation of every passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, for all distances upon and over its railroad.

IX.

For the reasons hereinbefore stated, this respondent respectfully prays that the petition in this proceeding be dismissed.

GRAND RAPIDS AND INDIANA RAILWAY CO.,
By R. R. METHEANY, *Auditor.*

T. J. O'BRIEN,
J. H. CAMPBELL,
Attorneys for Respondent.

STATE OF MICHIGAN, } ss:
County of Kent, }

R. R. Metheany, being duly sworn, deposes and says that he resides in the city of Grand Rapids, in the county of Kent, in the State of Michigan; that he is the auditor and secretary of The Grand Rapids and Indiana Railway Company, the respondent above named; that he is the accounting officer of said company, and as auditor, keeps the accounts of said company; that he has been such auditor for four years and upwards last past; that he has read the foregoing answer and knows the contents thereof, and that the matters therein stated are true as he verily believes.

R. R. METHEANY.

Subscribed and sworn to before me this ninth day of August, A. D. 1901.

JAMES B. HOWARD,
Notary Public in and for Kent County, Michigan.

25 (D.—*Proceedings on Order to Show Cause, August* 9, 1901.)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent, May Term, 1901.

Before Hon. Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY.

GRAND RAPIDS, MICHIGAN, FRIDAY, A. M., *August* 9, 1901.

(The petition and answer were here read.)

Mr. CAMPBELL: The first question in order, if your honor please, will be that presented by paragraph 6 in the petition and by paragraph 7. In going on I had assumed that we proceed with the hearing on the petition and on the answer.

Mr. OREN: Well, now, as bearing upon that, perhaps it would be well enough for us to make a statement of on what we rely, and possibly simplify it.

Mr. CAMPBELL: The question is whether there is any further pleading or any further statement to be filed.

Mr. OREN: Well, I will make a statement to the court. Now, may it please your honor, the issue that is sought to be raised by this answer is practically this: They say that by reason of a decision of our State supreme court, the opinion of Judge Morse in the Weldon case, that our supreme court has construed this act to shut off from the courts the consideration of the question as to whether, or not, the rate imposed is a reasonable rate; and they say that our State supreme court, having given that construction to the law, that under this decision of the United States court, and particularly this decision in the 134th United States, that our courts are giving this law an unconstitutional operation, and practically, if our State supreme court adheres to that construction of the law that the act itself would be unconstitutional.

Now, I will say in behalf of the State, that our examination of the authorities has led us to the conclusion (the reasons for which are very fully set out in detail in a brief we will file in this case), that this law cannot be given the operation that perhaps is intimated in this decision of our State supreme court in the Weldon case. I think the decisions of the United States Supreme Court are conclusive upon the fact that in legislation of this character it is impossible to debar the courts from passing finally upon the reasonableness or unreasonableness of the rates that are imposed, whether they are imposed by the legislature or by a commission. And we are
26 driven to the conclusion that unless there are some other controlling features in this case, that the court cannot do else, if

a replication is filed by us, then grant the issue and have a determination as to the facts as to whether or not this rate that is imposed by this act is reasonable. And were that feature alone in the case we would ask leave of the court at this time to file a replication and put in issue the facts which are stated here and relied upon by the respondent.

But I will say, your honor, that the view we take of the case is that there is another element in this case, which is more conclusive than the issue that is presented, that I have just referred to, and which we think is decisive of the case; and that point is this: It appears in the petition in this case that this corporation, the Grand Rapids and Indiana Railroad Company, was re-incorporated in 1896. This re-incorporation practically amounted to the creation of a new corporation, the terms of its charter being the provisions of our general railroad law, in which were found at this time, the time of the re-incorporation, these provisions relative to the rates that railroads organized under that act might be permitted to charge.

Now, it is the contention of the State in this case that by reason of this organization in 1896, when these provisions relative to maximum rates were in effect, that this corporation assumed contractoral relations with the State by which it assented to this scale of rates, and thereby precludes itself at any time thereafter of objecting when this law comes into operation, by reason of the earnings that are provided for and made the standard in this act. We say that if that proposition is based upon good law, that it makes no difference whether these rates are reasonable or unreasonable. They are the rates that the company contracted to perform these services at. They are bound by the terms of this law by reason of having organized under that act. And the various other questions that are raised in this proceeding, we claim that, by reason of this re-organization or incorporation in 1896, this company is precluded from raising.

In order to raise that single question which I think is decisive of the whole issue and includes all the others, in order that we may have that question determined, rather than go into a determination of the facts here, we would ask leave to file a demurrer to this answer alleging as our ground for demurrer the single point that I have raised here, namely, that by reason of this organization in 1896, this company is bound by the terms of our general railroad law, and particularly that provision relative to the scale that they shall be permitted to charge; and, that being true, that they are precluded from raising any other question in the case. Now, it would seem to me that that single question might be very readily raised by demurrer, and it would then be the sole question in the case and preclude the possibility of going into the other matters.

27 Mr. CAMPBELL: Of course the facts as to the incorporation of the respondent stated by the attorney general appear both in the petition and in the answer. A demurrer being filed, the first and the only question (until that is out of the way) to be considered is the demurrer.

Mr. OREN: I did not catch that.

Mr. CAMPBELL: The demurrer being filed, that is the first and only question to be determined.

Mr. OREN: Our idea in filing the demurrer, if we are defeated on that question, is that we are not precluded, according to the ordinary practice of the court, in later going into these other questions.

Mr. O'BRIEN: That entirely shifts the point made by the answer as anticipated. After filing your demurrer, you having made preparations on that point and we have not, I suppose we could fix a short time ahead to argue it or file briefs. You can file that instanter, I suppose.

Mr. OREN: Yes, we are prepared on that proposition.

Mr. O'BRIEN: We have not looked into that phase of the question, and if you will let us have your brief we will comply with it as soon as we can, either orally, or leave them with the court.

Mr. OREN: Well, suppose we take a week to exchange briefs in, giving us the privilege of putting in an answer-brief and submitting it in that form, if it would be satisfactory to the court.

The COURT: That would be all right, if that is the desire of the attorneys.

Mr. O'BRIEN: And let it be submitted on the brief.

Mr. OREN: Yes.

Mr. O'BRIEN: A week is a little bit short. I have just mapped out one week to be away, but I have no objection to a reasonable time.

Mr. CAMPBELL: Have you your brief prepared now to be submitted on this?

Mr. OREN: The brief that we have, of course, involves the other propositions in the case, but we can separate it.

Mr. O'BRIEN: The reference to some of your authorities would shorten our work, too.

Mr. OREN: I am not sure but what we might be able to detach the papers.

Mr. O'BRIEN: Suppose we have until the 20th.

Mr. OREN: Well, that is satisfactory.

The COURT: In which to furnish briefs.

Mr. O'BRIEN: We can furnish Mr. Oren the brief.

Mr. OREN: And we can have five days to reply.

Mr. CAMPBELL: You first give us your brief in support of the demurrer, which I understand you can do very soon.

Mr. OREN: We will give you a statement of our authorities right away.

The COURT: It is understood that leave may be given to file a demurrer which will be filed forthwith, I understand. The attorney general will furnish a memorandum of authorities on the
28 points raised in the demurrer; you will furnish your brief to him by the 20th of this month, and such reply brief as he desires will be furnished you by the 25th, and submitted to the court.

Mr. O'BRIEN: As I understand it, the attorney general has the affirmative of this issue that he now makes up.

The COURT: I suppose so.

Mr. O'BRIEN: And he will give us his brief very soon, within a day or two.

Mr. OREN: I can give you now a statement of our authorities and will, inside of two days, furnish it.

The COURT: It is understood it will be submitted on brief without further oral argument on the demurrer.

Mr. O'BRIEN: Yes, unless counsel should agree on the oral argument, or unless the court wishes it.

The COURT: If it is desirable to have oral arguments at any time and counsel agree on it, I suppose the court can arrange a time for hearing it.

STATE OF MICHIGAN, } ss:
County of Kent, }

I, Chas. H. Strawhecker, deputy official stenographer of the circuit court of the 17th judicial circuit, do hereby certify that the foregoing is a true and full transcript of the stenographic notes of the proceedings had in the cause therein entitled in said circuit court on the 9th day of August, A. D. 1901.

Grand Rapids, Mich., August 21, 1901.

CHAS. H. STRAWHECKER,
Deputy Stenographer.

(E.—*Demurrer.*)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY, Respondent.

Demurrer of the above named relator to the answer of the above named respondent.

And now comes the said relator and for cause of demurrer to the answer of the above named respondent, shows that the same is not sufficient in law for the reason,

That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated.

HORACE M. OREN,
Attorney General.

Dated this 10th day of August, A. D. 1901.

I hereby certify that the foregoing demurrer is not interposed for delay, and that it is, in my opinion, well founded.

HORACE M. OREN,
Attorney General.

29 (F.—*Order of Circuit Court that Mandamus Issue.*)

STATE OF MICHIGAN:

At a session of the circuit court for the county of Kent, held at the court house, in the city of Grand Rapids, on the ninth day of September, in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

This cause having come on for hearing on the petition, answer and demurrer thereto, and the same having been argued by counsel and duly considered by the court, and it appearing that the respondent has by its incorporation under the general railroad law of the State of Michigan, entered into a contract with the State to carry passengers at the rate fixed in subdivision nine, section nine of article three of said general railroad law, and that therefore the demurrer interposed by the said relator should be sustained, therefore,

It is ordered and adjudged by the court that the said demurrer be sustained, and that a peremptory writ of mandamus issue as prayed, directed to the said respondent commanding it forthwith and hereafter — issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage not exceeding in weight one hundred fifty pounds, at the rate of two and one-half cents per mile for all distances exceeding five miles.

It is further ordered and adjudged that the said relator recover from the respondent his costs to be taxed.

ALFRED WOLCOTT,
Circuit Judge.

30 (A.—*Petition for Mandamus.*)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

To the circuit court for the county of Kent:

Your petitioner, Chase S. Osborn, commissioner of railroads of the State of Michigan, acting for and in behalf of such State, respectfully shows:

1. That the Grand Rapids and Indiana Railway Company is a

corporation organized and existing under the general railroad law of this State, being act No. 198 of the session laws of 1873, as amended, having been reincorporated thereunder in 1896, and owning and leasing and operating a line of road lying partly in the lower peninsula of the State of Michigan, and partly in the State of Indiana, for the transportation of freight and passengers; and that of its said line of road about 439.40 miles is in the State of Michigan, consisting of about 376.55 miles of road from the Indiana State line to Mackinaw City, Michigan, with branches owned by it, and 36.85 miles leased from the Muskegon, Grand Rapids and Indiana Railroad Company, and 26 miles leased from the Traverse City Railroad Company.

2. That under and by virtue of act No. 79 of the session laws of 1873, as amended, it became and was the duty of the said Grand Rapids and Indiana Railway Company, on or before the first day of April, A. D. 1901, to make and transmit to your petitioner as commissioner of railroads, at his office in Lansing, Michigan, a full and true statement under oath of the affairs of said corporation on the 31st day of December preceding. That in the performance of the duty imposed upon it by said act the said Grand Rapids and Indiana Railway Company, did under the oath of its vice president and auditor, make and transmit to your petitioner, the commissioner of railroads of the State of Michigan, a statement of its affairs on the said 31st day of December, 1900, which was received on the 5th day of April, 1901; which said report and statement indicated and set forth (pages 14 and 15) the gross earnings of its passenger trains per mile of road operated as follows:

Main line and branches	$2,330.74
Leased or proprietary roads:	
Muskegon, Grand Rapids and Indiana R. R.	2,173.26
Traverse City railroad	1,088.52
Total passenger department earnings (per mile of road)	2,243.24

3. That after the receiving of said report and statement, and upon the 11th day of July, 1901, your petitioner, acting under and by virtue of the authority and the duty imposed upon him by said subdivision ninth of section nine, of article 2 of the general railroad law of this State, as amended, by a notice in writing addressed to its general manager, J. H. P. Hughart, at Grand Rapids, Michigan, notified the said
31 Grand Rapids and Indiana Railway Company that as the gross earnings of its passenger trains per mile of road operated by it within this State exceeded the sum of two thousand dollars, it would thereafter be allowed and required to receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, over any portion of the line of road operated by it in this State, a sum not to exceed two and one-half cents per mile for distances exceeding five miles; a copy of

which said notice is hereto attached, marked Exhibit A and made a part of this petition.

4. That upon and after receiving said notice as aforesaid, it became, was and now is the legal duty of the said Grand Rapids and Indiana Railway Company to reduce its rate of fare over any and every portion of the line of road operated by it within the State of Michigan for the transportation of any passenger and his or her ordinary baggage not exceeding in weight 150 pounds, to two and one-half cents per mile for distances exceeding five miles, and to thereafter sell tickets to all persons applying therefor, and to transport any person and his or her ordinary baggage, not exceeding in weight 150 pounds, for distances exceeding five miles, at the said rate of two and one half cents per mile. That notwithstanding said notices and said legal duty imposed upon the said Grand Rapids and Indiana Railway Company thereby, it refused and neglected, and still continues to refuse and neglect, to transport passengers at the rate required by law; but charges and insists upon receiving the sum of three cents per mile for all distances for the transportation of passengers over the said line of road operated by it within this State.

That your petitioner has no other specific legal remedy, and cannot have adequate legal relief without the aid of the people's writ of mandamus, by the interposition of this honorable court.

Your petitioner therefore prays that an order be entered compelling the said Grand Rapids and Indiana Railway Company to show cause why a peremptory writ of mandamus should not be issued, compelling it to comply with the provisions of said subdivision ninth of section 9 of article 2 of the general railroad law of this State, as amended by act No. 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued, tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in
weight 150 pounds, at the rate of two and one-half cents per
32 mile, for all distances exceeding five miles; and that such other
and further order may be entered as to the court shall seem
proper.

CHASE S. OSBORN,
By CHARLES H. CHAPMAN,
Deputy Commissioner of Railroads.

HORACE M. OREN,
Attorney General, for Petitioner.

STATE OF MICHIGAN, } ss:
County of Ingham, }

On this 12th day of July, 1901, personally appeared before me the undersigned, a notary public within and for said county, Charles H. Chapman, who made oath that he is deputy commissioner of railroads of the State of Michigan; that he has read the foregoing petition and knows the contents thereof, and that the same is true of

his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

ARTHUR N. FRAME,
Notary Public, Wayne Co., Mich.,
Acting in Ingham Co., Mich.

(EXHIBIT A TO PETITION OF RAILROAD COMMISSIONER.)

JULY 11, 1901.

Mr. J. H. P. Hughart, gen'l manager G. R. & I. R'y Co., Grand Rapids, Mich.

DEAR SIR: It is noticed by the annual report of your company for the year ending December 31, 1900, that on pages 14 and 15 of such report the total earnings of its passenger trains are given as $976,843.87, or $2,243.24 per mile of road. This brings the company under the provisions of section 6234, Compiled Laws of 1897, and requires that its rates of passenger fare be reduced to 2½ cents per mile. The statute provides that the compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed 2½ cents per mile, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads, equal or exceed $2,000 per mile. You will therefore please take notice that your company is hereby required to reduce its rates of passenger fares as required by law.

Very respectfully yours,

CHASE S. OSBORN,
Commissioner of Railroads.

33 (B.—*Order to Show Cause.*)

At a session of the circuit court for the county of Kent, held a the court room in the city of Grand Rapids, in said county, on the 13th day of July, in the year of our Lord one thousand nine hundred and one.

Present: Hon. Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

On reading and filing the petition of the relator above named, and on motion of Horace M. Oren, attorney general of the State of Michigan, attorney for relator:

It is ordered that the respondent, The Grand Rapids and Indiana Railway Company do show cause to this court on the 26th day of July, 1901, why a peremptory writ of mandamus should not be issued out of and under the seal of this court, to compel it, the said Grand Rapids and Indiana Railway Company, to comply with the

provisions of subdivision ninth of section 9 of article 2 of the general railroad law of this State, as amended by act No. 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued, tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight 150 pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles.

And it is further ordered that a certified copy of this order, together with a copy of the petition aforesaid, upon which this order is founded, be served on the said respondent, The Grand Rapids and Indiana Railway Company, at least ten days before the time herein limited for showing cause; and that a copy of the said respondent's affidavits or return in response to this order be served upon the relator's attorney at least three days prior to the time limited for showing cause.

ALFRED WOLCOTT,
Circuit Judge.

34 STATE OF MICHIGAN, *County of Kent,* } ss:

I, Connor H. Smith, clerk of the circuit court for the county of Kent, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript thereof and of the whole of said original order.

In testimony, whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court at the city of Grand Rapids in said county, this 13th day of July, 1901.

CONNOR H. SMITH, *Clerk,*
By RALPH A. MOSHER, *Deputy.*

35 (C.—*Answer of Respondent.*)

STATE OF MICHIGAN:

In the Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

Mandamus.

Answer of the respondent to the petition of the relator filed in said court and to the order to show cause.

The said relator having on the 13th day of July, 1901, filed in this court his petition, verified on the 12th day of July, 1901, praying that an order be entered compelling the said respondent to show

cause why a peremptory writ of mandamus should not be issued compelling it to comply with the provisions of subdivision nine of section nine in article II of the general railroad law of said State, as amended by act number 90 of the public acts of 1891, and to forthwith and hereafter issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, at the rate of two and one-half cents per mile, for all distances exceeding five miles, and said court having on the 13th day of July, 1901, on reading and filing said petition, made an order requiring this respondent to show cause to said court on the 26th day of July, 1901, why a peremptory writ of mandamus should not be issued, as prayed in said petition, the said respondent files this, its answer to said petition, and submits the same as showing sufficient cause why a writ of mandamus should not be issued as prayed by the relator.

I.

1. The entire constitutional and statute law of the State of Michigan on the subject of tolls and compensation, to be charged and received by railway companies, is contained in article XIX A of the constitution, and in section 9, subdivision ninth of article II of act 198 of the laws of 1873, entitled, "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State," as amended by act 202 of the laws of 1889.

These provisions are as follows:

Constitution, article XIX A. "The legislature may from
36 time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State" (adopted 1870, took effect January 1st, 1871).

"SEC. 9. Every such corporation shall possess the general powers and be subject to the liabilities and restrictions following, that is to say:

Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, nor exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile and for all companies the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of

road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: Provided, that in future whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile as hereinbefore provided: Provided, that roads in the upper peninsula *in* which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile: Provided further, that one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of this State, at a price not exceeding twenty dollars in the lower peninsula and twenty-five dollars in the upper peninsula. Such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any
37 other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company. Each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

The said section 9 in article II has been amended several times since 1889 in other subdivisions, but the ninth subdivision has not been changed since 1889, and now remains as then amended. It is the same statute referred to in the petition for mandamus in this proceeding as act 90 of 1891.

2. The supreme court of the State of Michigan is, under the constitution of the State, the highest court and the court of final resort in the State.

Two cases only have come before the supreme court of the State arising upon said statute: Wellman *vs.* The Chicago and Grand Trunk Railway Company, decided December 24, 1890, reported 83 Mich., 592, and The Commissioner of Railroads of the State of Michigan *vs.* The Wabash Railway Company, decided April 4, 1900, re-

ported 123 Mich., 669, in which a supplementary opinion was filed March 26, 1901, reported 85 Northwestern Reporter, 466 and '7, Detroit Legal News, 748.

In these cases the supreme court of the State upheld this statute and construed it and enforced it against the respective railway companies above named.

In the Wellman case the supreme court of Michigan, quoted, considered and construed the said constitutional and statutory provisions and decided that under said constitutional provision, the legislature was the exclusive and final judge of what were reasonable maximum rates of charges for the transportation of passengers on all railroads in the State of Michigan, and that the action of the legislature of the State in fixing maximum rates of such charges was final and conclusive upon the companies and the courts and that the reasonableness of such rates as fixed by the act of the legislature was not subject to review or inquiry by the courts or elsewhere, and that the companies were precluded from showing that such rates so fixed were unreasonable in any case.

3. The said constitutional provision and statute as so construed and enforced by the supreme court of the State, is in violation of the provision in the Constitution of the United States in section 1 of article XIV of the amendments, that no State shall deprive any person of property without due process of law.

4. The said constitutional provision and statute in the laws of Michigan are in violation of the said provision in the Constitution of the United States and void under the decision of the
38 Supreme Court of the United States in the case of The Chicago, Milwaukee and St. Paul Railway Company *vs.* The State of Minnesota (134 U. S., 418), in which the Supreme Court of the United States decided that the statute of the State of Minnesota under consideration in that case, as construed by the supreme court of Minnesota, conflicted with said provision in the Constitution of the United States, for the reason that it deprived the railway company, the party in said suit, "of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice," and that, "if a railway company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States, and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws," and that the issue of the peremptory writ of mandamus in that case by

the supreme court of the State of Minnesota was unlawful because in violation of the Constitution of the United States.

5. The said constitutional provision and statute in the State of Michigan are in violation of the said provision in the Constitution of the United States, as construed, interpreted and enforced by the Supreme Court of the United States in the said Minnesota case and in other decision- of said court forming part of the law of the land.

6. There is no difference or distinction in theory or principle between the act of the railway commission of Minnesota made final by the statute of Minnesota and condemned as unconstitutional by the Supreme Court of the United States in the said Minnesota case and the act of the legislature of the State of Michigan itself held to be final by the supreme court of the State of Michigan as aforesaid and the said act of the legislature of Michigan is as fully in violation of said provision in the Constitution of the United States as the said statute of Minnesota, which was condemned as unconstitutional by the Supreme Court of the United States in said Minnesota case. The thing condemned was the assume- power to arbitrarily and finally fix rates without a hearing of the companies affected, not the mere method of the exercise of such power, whether by the legislature or by a commission appointed by act of the legislature.

39 II.

The said statute in its terms and as construed by the supreme court of the State, imposes upon railway companies the said rate of two and one-half cents per mile for said transportation, arbitrarily and finally without any inquiry or proceeding to ascertain or determine whether such rate in any case is reasonable or not, and without any provision for such inquiry and without any opportunity for a company in any case to show that in fact such rate would be inadequate and unreasonable compensation for such transportation.

The courts of the State enforce said statute against railway companies, as the supreme court of the State did in said Wabash case by peremptory writ of mandamus, based upon the statute itself and a report by the company that the earnings of its passenger trains in any year exceeded $2,000 and did not exceed $3,000 per mile, and notice by the commissioner of railroads to the company to reduce its fares to two and one-half cents, and without any inquiry, trial or hearing as to the reasonableness of such rate as matter of fact in any case, and without any opportunity for the company in any case to show that such rate would be unreasonable.

The said statute and the said construction and effect given to it by the supreme court of the State and the enforcement thereof by the courts in the manner stated, is in violation of the provision in the Constitution of the United States in section 1 of article XIV of the amendments, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

III.

This respondent avers that the said rate, two and one-half cents per mile for transporting passengers and their baggage, according to said statute, is and would be inadequate, unreasonable and unjust, and would not be adequate or reasonable compensation for such transportation upon the railroad of this respondent. That the enforcement of said rate upon this respondent would reduce its earnings to the extent of seventy five thousand dollars ($75,000) and upwards per year (computed upon the earnings of 1900), and would deprive it to said extent of moneys and income to which it would be fairly and reasonably entitled from the use of its property for the transportation of persons and their ordinary baggage.

That the said statute of the State of Michigan, as construed and enforced by the courts of said State as aforesaid, imposes said rate upon this respondent arbitrarily and finally without any trial, hearing or inquiry as to the reasonableness of said rate applied
40 to the business of this respondent, and without any opportunity for this respondent to be heard and to show as it can and would show, if heard, that said rate would be inadequate and unreasonable compensation for said service, and without any provision in the law of the State for such hearing, and with this respondent precluded under said law, as construed by the courts, from being heard at all in the matter, and from showing that such rate would be inadequate, unreasonable and unjust when applied to the business of this respondent, and that the courts of the State, in enforcing and giving effect to said statute, if adhering to their decisions, would not consider the question whether or not such rate is or would be reasonable in any case, and would not hear this respondent on that question, and would not allow it to show that the said rate would be inadequate and unreasonable for such transportation upon its railroad.

That such enforcement of said rate upon this respondent in such manner and under such circumstances and conditions and with the effect herein stated, would be depriving this respondent of its property without due process of law, and would be a violation of the said provision of the Constitution *in* the United States, which forbids any State to deprive any person of property without due process of law.

IV.

That the said rate of two and one-half cents per mile for transporting passengers and their baggage, according to the terms of said statute, as construed by the supreme court of the State, would be an inadequate and unreasonable compensation to this respondent for said transportation.

1. It would reduce materially and to a great extent, and not less than seventy-five thousand dollars ($75,000) per year (computed on the business of 1900), the gross earnings of this respondent from the operation of its railroad, which do not now and have not at any time in the past, yielded to this respondent a fair income and profit upon

the capital invested by this respondent in its railroad property, over and above the expense of operation, economically conducted.

2. Only part of the travel on the railroad of this respondent would be subject to the two and one-half cents per mile rate under said statute, if enforced, that is, local travel wholly within the State of Michigan, between points in said State. This travel requires to a considerable extent, special and expensive service in local trains. The cost of said service economically conducted is such that two and one-half cents per mile for transporting persons and their baggage therein, according to said statute, would be inadequate and unreasonable compensation for such service, and would in many instances be less than the actual cost of running the trains to afford such transportation.

The enforcement of said rate upon this respondent would be unreasonable and unjust and such enforcement arbitrarily and without inquiry or hearing, and without opportunity for this respondent to show that the said rate would be inadequate and unreasonable, would be to unjustly and unreasonably deprive this respondent of its said earnings and of reasonable compensation for said transportation, in violation of said provision in the Constitution of the United States, that no State shall deprive any person of property without due process of law.

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V.

The said statute of Michigan, as construed by the supreme court of the State, operates as a regulation of commerce among States in violation of the provision in the Constitution of the United States, which vests in Congress entire and exclusive power to regulate commerce among the States (article I, section 8, clause 3).

This respondent is a corporation organized under the laws of the States of Michigan and Indiana. It owns and operates a railroad running from Fort Wayne, in the State of Indiana to the straits of Mackinaw, in the State of Michigan. Said railroad is an inter-state road, and this respondent is engaged in inter-state commerce and subject to the laws of the United States, regulating such commerce. A large part of the earnings of this company is derived from inter-state commerce, that is, from the transportation of persons and express matter and the United States mails on continuous trips upon its railroad, in both States, from points in Michigan to points in Indiana, and *vice versa*.

The supreme court of Michigan in the Wabash case (in the said opinion filed March 26th, 1901), decided that in determining what domestic fares shall be (that is the maximum of rates to be charged by companies for transporting persons and their baaggage within the State of Michigan uander said statute), the amount of interstate fares earned by that portion of the road lying within the State of Michigan must be included in the earnings to determin- the rates which the companies may charge under said statute.

The said statute of Michigan, so construed, is a regulation of inter-state commerce and a restriction upon such commerce in violation

of said provision in the Constitution of the United States (article I, section 8, clause 3).

This respondent avers that excluding the so-called Michigan proportion of the earnings of its passenger trains in inter-state business, the earnings of its passenger trains in 1900 would be much less than $2,000 per mile of road operated.

VI.

This respondent avers that two and one-half cents per mile for the transportation of persons and their baggage, not exceeding one hundred and fifty pounds in weight for each person for all distances over five miles, upon the railroad of this respondent, would not be adequate or reasonable compensation for such transportation,
42 and that the enforcement of such rate upon this respondent would be unreasonable and unjust, and would not allow this respondent sufficient compensation for such transportation.

Your petitioner prays that the court will in this proceeding order an issue of fact to be framed for the trial of this question, and that the decisions of the courts of this State holding that the said act of the legislature, expressed in said statute, is final and conclusive and preclu les railway companies from being heard as to the reasonableness of the rates fixed by said act, be reconsidered, reheard and overruled, and that the question of the adequacy and reasonableness of the said rate for the transportation of persons and their baggage, as aforesaid upon the railroad of this respondent, be tried, heard and determined by the court in this proceeding, and if it be found and determined that such rate would not be adequate or reasonable for such transportation, that the petition herein filed be dismissed.

VII.

Answering the statements of fact in the petition for mandamus in this proceeding, this respondent respectfully shows:

1. This respondent is a railway corporation, organized under the general laws of the State of Michigan and Indiana.

2. It was incorporated and organized in 1896 as a new an- independent company and not as the re-organization as stated in said petition of a former corporation.

3. In 1896 it acquired by purchase the property known as the Grand Rapids and Indiana railroad, theretofore owned and operated by another corporation, and this respondent then succeeded to all the property rights and all the franchises of the said former company, pertaining to said property.

4. The cost to this respondent of the property in August, 1896, was $15,278,700.

5. The said property consists of the main line of railroad, extending from Fort Wayne in the State of Indiana, northerly through the State of Indiana and the lower peninsula of the State of Michigan to Mackinaw City on the straits of Mackinaw. The length of said railroad is 366.59 miles, of which 53.11 miles are in the State

of Indiana. There are connected with said main line and owned by your petitioner ten short branch lines, all in the State of Michigan, the total length of which is 63.07 — (3.94 miles thereof *was* built in 1900, but not operated that year). The railroad property owned by this respondent consist- of the said main line and branch lines of railroad rights of way, road-bed, station grounds, station buildings and other appurtenances.

This respondent owns rolling stock and equipment for the operation of said railroad, consisting of locomotvies, passenger cars, freight cars and other cars, the value of which is $1,452,750.

43 6. There is outstanding indebtedness in the form of bonds, secured by mortgages on said railroad property, to the amount of $9,337,000, created as follows:

October 1st, 1869, time of payment now extended to July 1st, 1941	$5,375,000 00
August 1st, 1896, bonds issued due October 1st, 1936	3,962,000 00
Total	$9,337,000 00

$4,455,000 of said debt due July 1st, 1941, bears interest at four and one-half per cent.; $920,000 of said debt, due July 1st, 1941, bears interest at three and one-half per cent., and the said debt due October 1st, 1936, bears interest at four per cent.

The total annual interest on said indebtedness is $391,155.

This respondent has operated in connection with its said railroad, two lines of railroad in the State of Michigan, namely: the Muskegon, Grand Rapids and Indiana railroad, extending from the city of Grand Rapids to the city of Muskegon in the State of Michigan, 36.85 miles; and the Traverse City railroad, extending from Walton to the city of Traverse City, a distance of twenty-six miles. This respondent has never leased said lines but has operated the same in connection with its own railroad under arrangements with the companies owning said two lines, by which this respondent has operated the same and turned over to the other companies the surplus of earnings, over and above operating expenses. This respondent has not at any time derived any net income or earnings from said two lines, or either of them.

7. The total earnings from the operation of the said railroad of this respondent, and the said Muskegon and Traverse City roads for the year 1900, *was* $2,862,069.36.

The surplus of earnings over and above operating expenses, interest on debt and other charges, were as follows:

Of the Grand Rapids and Indiana railroad	$83,475 11
Of the Muskegon road	3,095 89
Of the Traverse City road	4,220 54

The capital stock of this respondent, authorized by its charter and the articles of association is $6,000,000. There *has* been issued and *is* now outstanding and owned by diverse persons, $5,791,700 in 57,917 shares of one hundred dollars each.

8. The said total earnings aforesaid, include all earnings from passenger and freight traffic, as follows:

Freight	$1,722,408 85
Passenger fares	978,881 92
Express and baggage	57,477 11
United States mails	59,183 43
Miscellaneous	6,753 06
From telegraph companies	9,687 85
Rent of tracks, yards and terminals	13,214 30
Other rents	1,866 49
Other sources	12,596 35
Total	$2,862,069 36

44 9. The reduction of passenger fares to two and one-half cents per mile would reduce the passenger earnings of this respondent as nearly as can be computed, $78,489 per annum. The effect of this computed on the basis of the business of 1900 in which the earnings were greater than in any former year, would be to very nearly leave no surplus whatever and would practically make the stock of this respondent worthless.

10. That the said earnings of passenger trains are made up as follows:

(1) Main line and branches:

Passenger fares	$885,474 87
Express and baggage	50,002 47
U. S. mails	52,667 91
Other sources	5,763 94
Total	$993,909 19
Per mile of road (427.17 miles)	2,326 73

(2) Muskegon, Grand Rapids and Indiana railroad:

Passenger fares	$69,728 80
Express and baggage	4,527 53
U. S. mails	4,848 99
Other sources	979 40
Total	$80,084 72
Per mile of road (36.85 miles)	2,173 26

(3) Traverse City railroad:

Passenger fares	$23,678 25
Express and baggage	2,947 11
U. S. mails	1,666 53
Other sources	9 72
Total	$28,301 61
Per mile of road (26 miles)	1,088 52

The totals are as follows:

For the three roads:

Passenger fares	$978,881 92
Express and baggage	57,477 11
U. S. mails	59,183 43
Other sources	6,753 06
Total	$1,102,295 52
Per mile of road (490.02 miles)	2,249 49

11. That the figures given in the last paragraph are the earnings of the entire main line from Ft. Wayne to Mackinaw City and of the Muskegon and Traverse City roads; that all of the last two roads are in Michigan. That the Michigan earnings of the
45 main line, including the Michigan proportion of inter-state business based on mileage, *is* as follows:

Passenger fares	$773,512 94
Express and baggage	43,549 94
U. S. mails	45,940 94
Other sources	5,453 72
Total	$868,457 54
Per mile of road	2,330 74

12. That the item, "other sources" in the last two paragraphs, cover- check room charges and similar small items.

13. That the statements of fact in said petition are contained in paragraphs numbered 1, 2, 3 and 4.

As to paragraph 1, this respondent says that the facts as to its incorporation and railroad are not correctly stated therein, and that the facts are as herein stated.

As to paragraph 2, this respondent admits the matters therein stated, and says that the facts as to its earnings and the matters contained in said report are more fully stated herein than in said paragraph 2 in the petition. That the said report of this respondent was made upon a blank form prepared and sent to it by the commissioner of railroads.

As to the third paragraph, this respondent admits that the relator sent a notice as therein stated, but it denies that in so doing he was acting under or by virtue of any authority or duty imposed upon him by law.

As to paragraph 4, this respondent admits that it does insist upon receiving the sum of three cents per mile for the transportation of every passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, for all distances over and upon the railroad owned and operated by this respondent, excepting the sale of one thousand mile books or tickets, and excepting some special and excursion rates which are offered to all persons caring to avail themselves of such rates, without discrimination.

VII*a*.

That the said railroad was built and in operation before the first day of January, 1873. It was built and owned and operated until June, 1896, by the Grand Rapids and Indiana Railroad Company, a corporation organized under the laws of the States of Michigan and Indiana, in the year 1870. The said last named corporation, on the first day of August, 1884, made a mortgage upon said railroad property to secure its bonds duly issued to the amount of three million (3,000,000) dollars. The said railroad and its appurtenant property was sold on the 10th day of June, 1896, under decrees of the circuit courts of the United States for the western district of Michigan, and for the district of Indiana, in foreclosure of said mortgage, and purchased by John C. Sims, who thereby became the owner of said property. Thereafter under section 2 in article I of said act 198 of the laws of 1873, the said John C. Sims, with
46 others who associated themselves with him, organized a corporation (this respondent) for the ownership and management of said railroad by a certificate duly signed by them on the 7th day of July, 1896, and recorded in the office of the secretary of state of the State of Michigan, on the 11th day of July, 1896, which certificate is as follows:

"To the honorable secretary of state of the State of Michigan:

Whereas, on the first day of August, A. D. 1884, the Grand Rapids and Indiana Railroad Company, being then a corporation existing under the laws of the States of Indiana and Michigan, formed by the consolidation of certain other railroad companies, under the laws of said States respectively, was the owner of a certain railroad extending from the city of Fort Wayne, in the county of Allen, in the State of Indiana, thence through the counties of Allen, Dekalb, Noble and La Grange, in the State of Indiana, to the State line between Indiana and Michigan; thence northward through the counties of St. Joseph, Kalamazoo, Allegan, Kent, Montcalm, Mecosta, Osceola, Wexford, Grand Traverse, Kalkasak, Antrim, Otsego, Charlevoix and Emmet to Mackinaw City, in the State of Michigan, a total distance of about three hundred and sixty-six and fifty-nine hundredths (366.59) miles; fifty-three and eleven hundredths (53.11) miles of said railway being located in the State of Indiana and three hundred and thirteen and forty-eight hundredths (313.48) miles thereof being located in the State of Michigan, and

Whereas, on said first day of August, A. D. 1884, said railroad company executed a mortgage or deed of trust dated that day, to John E. Davidson, William H. Barnes and Conrad Baker, as trustees, conveying all the said railroad in the said States of Indiana and Michigan, which was known as the Grand Rapids and Indiana railroad, together with certain branches and extensions thereof and certain other lands, properties, rights and franchises, more particularly described hereafter; said mortgage or deed of trust including all the property between said terminal points, which said railroad

company owned or possessed on the first day of August, 1884, or which it has since acquired, either in law or in equity, of every kind whatsoever appurtenant thereto; the object of said mortgage or deed of trust being to secure the payment of the principal and interest of the bonds of said Grand Rapids and Indiana Railroad Company, amounting to three million dollars, and

Whereas, afterwards, suits in equity were brought in the circuit courts of the United States for the western district of Michigan and for the district of Indiana, wherein John E. Davidson and William H. Barnes were complainants and the said Grand Rapids and Indiana Railroad Company and others were defendants, for the pur-
47 pose of procuring a decree of foreclosure upon said mortgage or deed of trust and such proceedings were had in each of said courts, that upon the original bills and answers thereto, and upon the report of the master in chancery, to whom said suits were referred, for the purpose of finding and reporting upon the facts in said suits, a final decree was rendered by the said circuit court of the United States for the western district of Michigan, and also by the said circuit court of the United States for the district of Indiana, the decree of the former court being entered on the 7th day of March, A. D. 1896; and that of the latter court on the 12th day of March, A. D. 1896; and in and by said decrees it was ordered, adjudged and decreed that the said mortgage should be foreclosed and that the property therein mentioned should be sold as an entirety, and in the said decrees the property thereby ordered to be sold was describe- as follows, to-wit:

All and singular the railroad of the Grand Rapids and Indiana Railroad Company, which is known as the Grand Rapids and Indiana railroad, extending from the city of Fort Wayne in Allen county, in the State of Indiana, by way of Grand Rapids in the State of Michigan, to the waters of the straits of Mackinaw, in the village of Mackinaw City, in said State of Michigan, including the dock at the terminus of said railroad, and including also the frontage and the land out into the deep waters of the straits of Mackinaw, being a distance of 366 miles, more or less; including also the Missaukie branch, which extends from Missaukie on the main line, in the county of Wexford, northeasterly to a point near Falmouth, a distance of about eighteen miles, together with the equipment and franchises thereunto belonging or in anywise appertaining, including the roadbed of said railroad and branch, and all the tracks, sidetracks, spur tracks, rights of way, bridges, viaducts, culverts, fences, depots, station grounds, station houses, freight houses, wood houses, machine and other shops, telegraph lines and equipment, and all other structures, buildings and materials whatsoever placed and to be placed on the said rai-road or branch, or any part thereof; and also all locomotives, tenders, passenger, baggage, freight and other cars, and all rolling stock whatsoever heretofore acquired or which at the time of the sale hereunder shall have been acquired by the said Grand Rapids and Indiana Railroad Company for use upon, or in connection with, the said railroad or any part thereof; and also

all depot grounds and other lands heretofore acquired, or which at the date of the sale may have been acquired for use in connection with the said railroad and branch, or in the operation thereof; together with all and singular the tenements, property and appurtenances of said railroad and corporation and the rights, privileges and franchises thereunto belonging or in any wise appertaining; and also all the estate, right, title, interest, income and property, possession, claims and demands whatsoever, as well at law
48 as in equity, of the said Grand Rapids and Indiana Railroad Company, in, about and concerning the same, and each and every parcel thereof; also the railroad known as the Bay View, Little Traverse and Mackinaw railroad, extending from near Bay View, in Emmet county, Michigan, in a northerly direction, and terminating at the village of Harbor Springs, in the said county of Emmet, together with all and singular the rights, property and franchises owned heretofore and belonging to the said Bay View, Little Traverse and Mackinaw Railroad Company, including any sidetracks, station houses, station buildings, telegraph line, water tanks, and other property, both real and personal, belonging to said railroad; also all the right, title and interest of the said Grand Rapids and Indiana Railroad Company in and to the Cincinnati, Richmond and Fort Wayne railroad, extending from a point near Fort Wayne, in the county of Allen, State of Indiana, to the city of Richmond, in said State, being a distance of about eighty-five miles, and in the lease or contract dated June 1st, 1871, between the said Grand Rapids and Indiana Railroad Company, the Cincinnati, Richmond and Ft. Wayne Railroad Company, the Cincinnati, Hamilton and Dayton Railroad Company, and the Pennsylvania Company, having reference to the lease and operation of said Cincinnati, Richmond and Fort Wayne railroad by the Grand Rapids and Indiana Railroad Company for the period of ninety-nine years; also, all and sin*ug*lar the right, title and interest of the said Grand Rapids and Indiana Railroad Company in and to the railroad known as the Traverse City railroad extending from Walton Junction on the line of the said Grand Rapids and Indiana railroad to Traverse City, in Grand Traverse county, in said State of Michigan, a distance of about twenty-six miles, and in the lease dated January 1st, 1883, made by the said Traverse City Railroad Company to the defendant, The Grand Rapids and Indiana Railroad Company, for the possession and operation of said Traverse City railroad from the date of said agreement until the 1st day of January, 1933.

Including also all the material and supplies belonging to said Grand Rapids and Indiana Railroad Company and on hand at the date of sale used and partly used. Also any balance that may be found due to the said defendant, The Grand Rapids and Indiana Railroad Company on an adjustment between said company and connecting carriers over and above the amount which may be found due from said defendant company to other carriers, and

Whereas, afterwards, to-wit, on the 10th day of June, A. D. 1896, all the property hereinbefore described was sold at public sale, under

and in pursuance of each of said final decrees of said courts, by John S. Lawrence, master in chancery, therein named, at which sale the undersigned, John C. Sims, became the purchaser of all said property, and said John C. Sims has since the date of said purchase, associated with himself the other persons whose names are
49 hereunto subscribed, all of whom desire and intend to form a corporation under the laws of the State of Michigan, as hereinafter more particularly set forth; and

Whereas, afterwards, to-wit, on the 2nd day of July, A. D. 1896, the said John S. Lawrence, master in chancery, did by deed executed and dated on said day, convey to said John C. Sims, the entire railroad and all the property, franchises and appurtenances which were so sold by him to said John C. Sims, on said 10th day of June, A. D. 1896; the amount paid therefor by said John C. Sims being five hundred thousand dollars ($500,000);

Now, therefore, in pursuance of the statutes of the State of Michigan, in such case made and provided, and especially in pursuance of section two of an act entitled, "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations, owning or operating any railroad in this State;" the same being designated as No. 198 laws of 1873.

We whose names are hereunto subscribe-, do hereby form ourselves into a corporaiton, for the purpose of owning, maintaining and operating the railway and all other property hereinbefore described, and for this purpose, we do hereby declare and certify as follows:

1. The name of said new corporation shall be the Grand Rapids and Indiana Railway Company.

2. The number of directors of said corporation shall be seven.

3. The names of the first directors of said corporation are the following: James McCrea, Pittsburgh, Pa.; J. T. Brooks, Salem, Ohio; John L. Davidson, Pittsburgh, Pa.; Joseph Wood, Pittsburgh, Pa.; W. R. Shelby, Grand Rapids, Mich.; Harvey J. Hollister, Grand Rapids, Mich.; T. J. O'Brien, Grand Rapids, Mich.

4. The period of service of such directors shall be from the filing of this certificate in the office of the secretary of state of Michigan, until the first Wednesday of March, A. D. 1897, and thereafter directors shall be chosen annually on the first Wednesday of March, until otherwise provided in accordance with law.

5. The capital stock of the corporation hereby formed, shall be six million dollars ($6,000,000), consisting of sixty thousand (60,000) shares of the par value of one hundred dollars each, and the same shall be issued as follows:

To John C. Sims, fifty-nine thousand nine hundred and ninety-three (59,993) shares.

To James McCrea, one share; to J. T. Brooks, one share; to John E. Davidson, one share; to Joseph Wood, one share; to W. R. Shelby, one share; to Harvey J. Hollister, one share; to T. J. O'Brien, one share.

In testimony whereof, we have hereunto affixed our hands
50 and seals this 7th day of July, A. D. eighteen hundred and ninety-six.

J. C. SIMS.	[SEAL.]
JAMES McCREA.	[SEAL.]
J. T. BROOKS.	[SEAL.]
JOHN E. DAVIDSON.	[SEAL.]
T. J. O'BRIEN.	[SEAL.]
L. L. GILBERT.	[SEAL.]
S. C. SCOTT.	[SEAL.]

By virtue of the said certificate, this respondent became and now is duly incorporated, and the owner of said railroad property, and has since that date owned, possessed and operated the same.

VIII.

This respondent respectfully insists that it has the right to charge and receive the sum of three cents per mile for the transportation of every passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, for all distances upon and over its railroad.

IX.

For the reasons hereinbefore stated, this respondent respectfully prays that the petition in this proceeding be dismissed.

GRAND RAPIDS AND INDIANA RAILWAY CO.,
By R. R. METHEANY, *Auditor.*

T. J. O'BRIEN,
J. H. CAMPBELL,
Attorneys for Respondent.

STATE OF MICHIGAN, *County of Kent,* } ss:

R. R. Metheany, being duly sworn, deposes and says that he resides in the city of Grand Rapids, in the county of Kent, in the State of Michigan; that he is the auditor and secretary of The Grand Rapids and Indiana Railway Company, the respondent above named; that he is the accounting officer of said company, and as auditor, keeps the accounts of said company; that he has been such auditor for four years and upwards last past; that he has read the foregoing answer and knows the contents thereof, and that the matters therein stated are true as he verily believes.

R. R. METHEANY.

Subscribed and sworn to before me this ninth day of August, A. D. 1901.

JAMES B. HOWARD,
Notary Public in and for Kent County, Michigan.

51 (D.—*Proceedings on Order to Show Cause, August* 9, 1901.)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent, May Term, 1901.

Before Hon. Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY.

GRAND RAPIDS, MICHIGAN, FRIDAY, A. M., *August* 9, 1901.

(The petition and answer were here read.)

Mr. CAMPBELL: The first question in order, if your honor please, will be that presented by paragraph 6 in the petition and by paragraph 7. In going on I had assumed that we proceed with the hearing on the petition and on the answer.

Mr. OREN: Well, now, as bearing upon that, perhaps it would be well enough for us to make a statement of on what we rely, and possibly simplify it.

Mr. CAMPBELL: The question is whether there is any further pleading or any further statement to be filed.

Mr. OREN: Well, I will make a statement to the court. Now, may it please your honor, the issue that is sought to be raised by this answer is practically this: They say that by reason of a decision of our State supreme court, the opinion of Judge Morse in the Welman case, that our supreme court has construed this act to shut off from the courts the consideration of the question as to whether, or not, the rate imposed is a reasonable rate; and they say that our State supreme court, having given that construction to the law, that under this decision of the United States court, and particularly this decision in the 134th United States, that our courts are giving this law an unconstitutional operation, and practically, if our State supreme court adheres to that construction of the law that the act itself would be unconstitutional.

Now, I will say in behalf of the State, that our examination of the authorities has led us to the conclusion (the reasons for which are very fully set out in detail in a brief we will file in this case), that this law cannot be given the operation that perhaps is intimated in this decision of our State supreme court in the Welman case. I think the decisions of the United States Supreme Court are conclusive upon the fact that in legislation of this character it is impossible to debar the courts from passing finally upon the reasonableness or unreasonableness of the rates that are imposed, whether they are imposed by the legislature or by a commission. And we are
52 driven to the conclusion that unless there are some other controlling features in this case, that the court cannot do else, if

a replication is filed by us, then grant the issue and have a determination as to the facts as to whether or not this rate that is imposed by this act is reasonable. And were that feature alone in the case we would ask leave of the court at this time to file a replication and put in issue the facts which are stated here and relied upon by the respondent.

But I will say, your honor, that the view we take of the case is that there is another element in this case, which is more conclusive than the issue that is presented, that I have just referred to, and which we think is decisive of the case; and that point is this: It appears in the petition in this case that this corporation, the Grand Rapids and Indiana Railroad Company, was re-incorporated in 1896. This re-incorporation practically amounted to the creation of a new corporation, the terms of its charter being the provisions of our general railroad law, in which were found at this time, the time of the re-incorporation, these provisions relative to the rates that railroads organized under that act might be permitted to charge.

Now, it is the contention of the State in this case that by reason of this organization in 1896, when these provisions relative to maximum rates were in effect, that this corporation assumed contractoral relations with the State by which it assented to this scale of rates, and thereby precludes itself at any time thereafter of objecting when this law comes into operation, by reason of the earnings that are provided for and made the standard in this act. We say that if that proposition is based upon good law, that it makes no difference whether these rates are reasonable or unreasonable. They are the rates that the company contracted to perform these services at. They are bound by the terms of this law by reason of having organized under that act. And the various other questions that are raised in this proceeding, we claim that, by reason of this re-organization or incorporation in 1896, this company is precluded from raising.

In order to raise that single question which I think is decisive of the whole issue and includes all the others, in order that we may have that question determined, rather than go into a determination of the facts here, we would ask leave to file a demurrer to this answer alleging as our ground for demurrer the single point that I have raised here, namely, that by reason of this organization in 1896, this company is bound by the terms of our general railroad law, and particularly that provision relative to the scale that they shall be permitted to charge; and, that being true, that they are precluded from raising any other question in the case. Now, it would seem to me that that single question might be very readily raised by demurrer, and it would then be the sole question in the case and preclude the possibility of going into the other matters.

53 Mr. CAMPBELL: Of course the facts as to the incorporation of the respondent stated by the attorney general appear both in the petition and in the answer. A demurrer being filed, the first and the only question (until that is out of the way) to be considered is the demurrer.

Mr. OREN: I did not catch that.

Mr. CAMPBELL: The demurrer being filed, that is the first and only question to be determined.

Mr. OREN: Our idea in filing the demurrer, if we are defeated on that question, is that we are not precluded, according to the ordinary practice of the court, in later going into these other questions.

Mr. O'BRIEN: That entirely shifts the point made by the answer as anticipated. After filing your demurrer, you having made preparations on that point and we have not, I suppose we could fix a short time ahead to argue it or file briefs. You can file that instanter, I suppose.

Mr. OREN: Yes, we are prepared on that proposition.

Mr. O'BRIEN: We have not looked into that phase of the question, and if you will let us have your brief we will comply with it as soon as we can, either orally, or leave them with the court.

Mr. OREN: Well, suppose we take a week to exchange briefs in, giving us the privilege of putting in an answer-brief and submitting it in that form, if it would be satisfactory to the court.

The COURT: That would be all right, if that is the desire of the attorneys.

Mr. O'BRIEN: And let it be submitted on the brief.

Mr. OREN: Yes.

Mr. O'BRIEN: A week is a little bit short. I have just mapped out one week to be away, but I have no objection to a reasonable time.

Mr. CAMPBELL: Have you your brief prepared now to be submitted on this?

Mr. OREN: The brief that we have, of course, involves the other propositions in the case, but we can separate it.

Mr. O'BRIEN: The reference to some of your authorities would shorten our work, too.

Mr. OREN: I am not sure but what we might be able to detach the papers.

Mr. O'BRIEN: Suppose we have until the 20th.

Mr. OREN: Well, that is satisfactory.

The COURT: In which to furnish briefs.

Mr. O'BRIEN: We can furnish Mr. Oren the brief.

Mr. OREN: And we can have five days to reply.

Mr. CAMPBELL: You first give us your brief in support of the demurrer, which I understand you can do very soon.

Mr. OREN: We will give you a statement of our authorities right away.

The COURT: It is understood that leave may be given to file a demurrer which will be filed forthwith, I understand. The attorney general will furnish a memorandum of authorities on the
54 points raised in the demurrer; you will furnish your brief to him by the 20th of this month, and such reply brief as he desires will be furnished you by the 25th, and submitted to the court.

Mr. O'BRIEN: As I understand it, the attorney general has the affirmative of this issue that he now makes up.

The COURT: I suppose so.

Mr. O'BRIEN: And he will give us his brief very soon, within a day or two.

Mr. OREN: I can give you now a statement of our authorities and will, inside of two days, furnish it.

The COURT: It is understood it will be submitted on brief without further oral argument on the demurrer.

Mr. O'BRIEN: Yes, unless counsel should agree on the oral argument, or unless the court wishes it.

The COURT: If it is desirable to have oral arguments at any time and counsel agree on it, I suppose the court can arrange a time for hearing it.

STATE OF MICHIGAN, } ss:
County of Kent, }

I, Chas. H. Strawhecker, deputy official stenographer of the circuit court of the 17th judicial circuit, do hereby certify that the foregoing is a true and full transcript of the stenographic notes of the proceedings had in the cause therein entitled in said circuit court on the 9th day of August, A. D. 1901.

Grand Rapids, Mich., August 21, 1901.

CHAS. H. STRAWHECKER,
Deputy Stenographer.

(E.—*Demurrer.*)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY, Respondent.

Demurrer of the above named relator to the answer of the above named respondent.

And now comes the said relator and for cause of demurrer to the answer of the above named respondent, shows that the same is not sufficient in law for the reason,

That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated.

HORACE M. OREN,
Attorney General.

55 Dated this 10th day of August, A. D. 1901.

I hereby certify that the foregoing demurrer is not interposed for delay, and that it is, in my opinion, well founded.

HORACE M. OREN,
Attorney General.

(F.—*Order of Circuit Court that Mandamus Issue.*)

STATE OF MICHIGAN:

At a session of the circuit court for the county of Kent, held at the court house, in the city of Grand Rapids, on the ninth day of September, in the year of our Lord one thousand nine hundred and one,

Present: The Honorable Alfred Wolcott, circuit judge.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

This cause having come on for hearing on the petition, answer and demurrer thereto, and the same having been argued by counsel and duly considered by the court, and it appearing that the respondent has by its incorporation under the general railroad law of the State of Michigan, entered into a contract with the State to carry passengers at the rate fixed in subdivision nine, section nine of article three of said general railroad law, and that therefore the demurrer interposed by the said relator should be sustained, therefore,

It is ordered and adjudged by the court that the said demurrer be sustained, and that a peremptory writ of mandamus issue as prayed, directed to the said respondent commanding it forthwith and hereafter — issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the State of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage not exceeding in weight one hundred fifty pounds, at the rate of two and one-half cents per mile for all distances exceeding five miles.

It is further ordered and adjudged that the said relator recover from the respondent his costs to be taxed.

ALFRED WOLCOTT,
Circuit Judge.

56 STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent.

COUNTY OF KENT, *ss:*

I, Connor H. Smith, clerk of the county and court aforesaid, do hereby certify that the above and foregoing are true and compared copies of the original petition, answer and other papers filed in this cause, and the rules and final judgment entered therein, and of the whole of said cause remaining on record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 7th day of November, A. D. 1901.

CONNOR H. SMITH, *Clerk*,
By RAYMOND PEARL, *Deputy*.

[Seal of the Circuit Court for the County of Kent.]

57 (*Writ of Certiorari.*)

In the name of the People of the State of Michigan.

[Seal of the Supreme Court of Michigan. Lansing.]

To the judges of the circuit court for the county of Kent:

We, being willing, for certain causes, that it should be certified to our supreme court what proceedings have been had before you, and what has been done by you in the matter of granting a peremptory writ of mandamus in a case pending in said circuit court wherein The Commissioner of Railroads of the State of Michigan is relator and The Grand Rapids and Indiana Railway Company is respondent.

Do, therefore, command you, that you distinctly and openly certify the records and proceedings in said matter to the said supreme court, before the justices thereof, that they may have them at the supreme court room, in the capitol, in the city of Lansing, on the fourteenth day of November, A. D. 1901, that said court may cause to be done thereupon what of right ought to be done, and have you then and there this writ.

Witness, the Honorable Robert M. Montgomery, chief justice of our supreme court, at Lansing, this fourth day of November, in the year of our Lord one thousand nine hundred and one.

CHAS. C. HOPKINS,
Clerk Supreme Court.

I hereby certify that the foregoing writ was duly allowed by Honorable Robert M. Montgomery, chief justice supreme court, and an order made that all proceedings under *of* order of circuit court be stayed, on the fourth day of November, 1901.

CHAS. C. HOPKINS, *Clerk.*

To the supreme court of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

Nov. 7, 1901.

RAYMOND PEARL,
Deputy Clerk.

(Endorsed:) Filed Nov. 14, 1901. Chas. C. Hopkins, clerk supreme court.

58 STATE OF MICHIGAN:

In the Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent.

SIR: Please take notice that the respondent in the above entitled case, has caused a writ of certiorari to be issued out of and under the seal of the supreme court of the State of Michigan, directed to the judges of the circuit court for the county of Kent. Said writ of certiorari is dated November 4th, 1901, and is returnable at the supreme court room in the city of Lansing on the 14th day of November, 1901. A copy of said writ is served on you herewith.

Yours, etc.

T. J. O'BRIEN,
Attorney for Appellant.

Dated November 5 1901.

To Hon. Horace M. Oren, attorney general.

STATE OF MICHIGAN, } ss:
County of Kent, }

Elizabeth A. Murphy being duly sworn deposes and says that on the 5th day of November 1901, she served a notice, of which the within is a true copy, upon Horace M. Oren, attorney general in the within entitled cause, by mail, by depositing the same in the United States postoffice in the city of Grand Rapids, in an envelope securely sealed, addressed "Hon. Horace M. Oren, attorney general, Lansing, Mich." with the postage thereon fully prepaid.

ELIZABETH A. MURPHY.

Subscribed and sworn to before me this 11th day of November, 1901.

JAMES B. HOWARD,
Notary Public, Kent County, Michigan.

[Endorsed:] No. 19043. Supreme court of the State of Michigan. Chase S. Osborn, commissioner, plaintiff and — *vs.* The G. R. & I. R'y Co. defendant and —. Proof of service of notice of the issuing of writ of certiorari. Filed Nov. 12 1901 Chas. C. Hopkins, clerk supreme court. T. J. O'Brien, attorney for appellant.

59 STATE OF MICHIGAN:

In the Supreme Court.

Certiorari to the Circuit Court for the County of Kent.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent and Appellant.

Motion that Case be Heard as Calendar Cause.

The appellant respectfully moves the court for an order that the above entitled cause be heard in this court upon printed records and briefs and as a calendar cause, under the practice prescribed by rules 34 to 47 inclusive of this court.

This motion is founded on the provision of rule 12, (relating to cases upon certiorari to the circuit court in mandamus cases originating in the latter courts); that the cause may be noticed for hearing as a motion by either party on any motion day *unless otherwise ordered*, for the reasons: (1) The hearing of this case as a motion will be entirely inadequate for the convenient and proper consideration of the record and the questions arising thereon. (2) The extent of the record of this case requires that it shall be printed to enable the court to conveniently and properly consider it. (3) The argument of the case as a motion under the rule would be entirely inadequate for the proper presentation of the case and the points involved therein, to the court.

This motion is founded on the petition for writ of certiorari and the writ and the return thereto, which are in the files of this court in the case.

Dated November 14, 1901.

T. J. O'BRIEN,
Att'y for Appellant.

(Endorsed:) Filed November 16, 1901. Chas. C. Hopkins, clerk.

60 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent.

Statement of Attorney General upon Motion that Cause be Heard on Printed Record and Briefs and as a Calander Cause.

1. The record in this cause presnets but one question, a clear, clean-cut and simple question of law, viz: whether or not by its incorporation under the general railroad law of this State, in 1896, that law, and particularly the provisions therein fixing the rate of charge, became a contract between the Grand Rapids & Indiana Railway Company and the State of Michigan.

2. This question of law was carefully examined on both sides, and complete briefs filed, in the circuit court. The work of remodeling those briefs and making them more complete and extensive so as to fully cover the question presented, could be performed in ten days at the outside, and a sufficient time has elapsed since appellant has applied for its writ of certiorari to complete its brief.

3. The printing of the record in the case could be completed in three days at the utmost.

In view of the above facts there is no good reason for carrying the case over the term and placing it upon the January calendar in order that the same may be heard on printed record and briefs, and I therefore ask that the motion of the appellant be denied, and that the relator be permitted to notice the same as a motion, or that a day for hearing be fixed early in December.

Respectfully submitted,

HORACE M. OREN,
Attorney General.

(Endorsed:) Filed Nov. 16, 1901. Chas. C. Hopkins, clerk supreme court.

61 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the nineteenth day of November in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice. Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE COMMISSIONER OF RAILROADS
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY. } No. 19043.

In this cause a motion is entered for an order making the case a docket case for the next regular term of this court, after due consid-

eration thereof by the court, the motion is denied with costs to the relator.

62 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the tenth day of December in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice. Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE COMMISSIONER OF RAILROADS, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent and Appellant. } No. 19043.

This cause coming on to be heard is duly submitted on briefs.

63 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, Respondent.

And now comes the above named relator, Chase S. Osborn, commissioner of railroads by Horace M. Oren, attorney general, and moves the court for leave to file in said cause the amended demurrer hereto annexed.

The ground for this motion being, that, as said cause will probably be removed for review to the Supreme Court for the United States, it should affirmatively and specifically appear upon the face of the record that the provision contained in the general railroad law, fixing the rates of charge for the carriage of passengers (subdivision 9, section 9, article 2, general railroad law), is claimed, on the part of the State, to be a condition of the existence of the respondent, and of the enjoyment by it of the powers and privileges granted in the statute.

HORACE M. OREN,
Attorney General.

Dated this 17th day of December, A. D. 1901.

64 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, Respondent.

Amended Demurrer of the Above Named Relator to the Answer of the Above Named Respondent.

And now comes the said relator and for cause of demurrer to the answer of the above named respondent, shows that the same is not sufficient in law for the reasons

1. That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine of article two of said general railroad law, under which it is incorporated.

2. That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision ninth, section nine of article two of that law, said provision in regard to rates being one of the conditions of the existence of respondent.

HORACE M. OREN,
Attorney General.

Dated December 17th, 1901.

I hereby certify that the foregoing demurrer is not interposed for delay, and that it is in my opinion well founded.

HORACE M. OREN,
Attorney General.

65 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, Respondent,

You will please take notice that the annexed and foregoing is a copy of a motion to amend the demurrer filed in the above entitled cause, which will be brought on for hearing on Tuesday, the 31st day of December, 1901, or as soon thereafter as counsel can be heard.

Yours, etc.,

HORACE M. OREN,
Attorney General.

To T. J. O'Brien, attorney for respondent. James H. Campbell, of counsel.

8—61

66 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent.

Statement on Motion to Amend Demurrer.

The cause for demurrer assigned in the original demurrer filed in this case, found in the record herein, (p. 41), has been believed and assumed by relator and his counsel to be sufficiently broad to raise the principal question.

1. That the respondent, by its incorporation in 1896 under the general railroad law, became a party to a contract with the State, and part of that contract being the agreement on the part of the railroad company to carry passengers at the rates fixed therein; and also the incidental question,

2. That the provision in regard to rates constituted one of the conditions of the existence of the respondent.

However, out of the abundance of caution, in view of the fact that this case will undoubtedly be taken to the Federal Supreme Court for review, it is desired that the demurrer specifically and directly raise both of these questions; hence this motion.

The precedent for making a motion of this character, at this time, will be found in the case of Osborn *v.* Wabash Railroad Co. 123 Mich. 669; and 85 N. W. 466, in which, after a decision of the case adverse to the respondent, it was permitted by this court, on motion of Mr. Alfred Russell, its attorney, to make an amendment to its answer filed in said cause in the circuit court.

Respectfully submitted.

HORACE M. OREN,
Attorney General.

(Endorsed:) Filed Dec. 20, 1901. Chas. C. Hopkins, clerk supreme court.

67 STATE OF MICHIGAN:

In the Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, Respondent.

Objections by Respondent to Amendment to Relator's Demurrer.

The attorney general having given notice, dated December 17, 1901 of motion for leave to file the amended demurrer annexed to said motion; the said amendment consisting of an additional ground

of demurrer, to-wit: that upon its incorporation in 1896, under the general railroad law, the respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision 9 section 9 article II of that law; said provision being one of the conditions of the existence of respondent.

The said respondent objects to the allowance and making of such amendment. The grounds of this objection are:

1. This court has no power to allow the proposed amendment. The amendment proposed is not to supply any omission or error in the return. It proposes to change the issue made in the circuit court, upon which that court entered its judgment and to introduce a new ground of demurrer, which is substantially different from the ground of demurrer as filed in the circuit court.

2. If it shall be held that this court has the power to allow such amendment, the proposed amendment is one which this court, in the exercise of its discretion, should not allow to be made.

Dated December 27, 1901.

T. J. O'BRIEN,
Attorney for Respondent.

(Endorsed:) Filed December 28, 1901. Chas. C. Hopkins, clerk.

68 STATE OF MICHIGAN:

Supreme Court.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent.

Additional Statement in Support of Motion for Leave to File Amended Demurrer.

This motion is opposed by counsel for respondent upon the ground, principally, that it imports a new and distinct issue into the case, which was not presented to or argued in the circuit court or heretofore in this court. The answer to this objection is that the amended demurrer does not and will not import into the case a new and distinct issue, as (*a*) the additional cause for demur assigned in the amended demurrer which we desire to file is included in the demurrer filed in the circuit court; (*b*) the additional cause for demur is and was supposed by relator to be in the case as embraced in the cause for demur assigned in the circuit court as incidental to the principal cause for demur, viz: that the respondent had entered into a contract with the State, and (*c*) the incidental question specifically raised in the amended demurrer sought to be filed is fully argued and presented in relator's briefs, and if the amendment is permitted no other or additional argument would be made.

The cause for demur assigned in the circuit court was,

"1. That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party to a

contract with the State of Michigan, one of the conditions of which was and is the agreement on the part of the said respondent to carry all passengers at the rates fixed by subdivision ninth, section nine, of article two of said general railroad law, under which it is incorporated."

The additional cause for demur now sought to be made is,

"2. That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision ninth, section nine of article two of that law, said provision in regard to rates being one of the conditions of the existence of respondent."

There is a very little difference in the two propositions above made; in fact, there is no difference except in the form of expression. One is that because the respondent became incorporated under a general law of the State a provision of that law relating to rates becomes a condition of the contract, which by reason of the incorporation comes into existence between the corporation and the State. The other, that because the company is incorporated under a general law of the State a provision which that law contains becomes a condition of the existence of the company, and that it is bound thereby.

The additional cause for demur now sought to be included being embraced in the cause for demur assigned in the circuit court, the only reason for having the demurrer amended is that it will specifically and affirmatively set forth and call to the attention of this court, and that of the Federal Supreme Court, in case the proceeding is removed to that court, the proposition that a corporation by accepting the rights, powers and privileges and existence which the State grants becomes subject to the conditions which the State attaches to that existence, and that a provision in a general act for the incorporation of railroad companies which limits rates of charge to be made by such company is a condition of the existence of the company.

The term "contract" when used in reference to corporations and their relation to the State is what may be deemed a relative term, and does not necessarily convey the same meaning as would that word used in reference to an agreement between private individuals.

The term has come to be used, not from the identity of the character of the mutual relations which exist between a corporation and the State and the relations of contract between private individuals, but from the analogy of such relationship. Thus, the word "contract" as used in the Dartmouth College case and the kindred decisions in which a corporate charter is declared to be a contract means the relationship which exists between the corporation and the State, by reason of the rights granted to and duties and obligations imposed upon the corporation by the State, upon their acceptance by the corporation. Such is the meaning of the word "contract" as used in the original demurrer in this case. Such being the meaning, it necessarily includes within its terms the

additional cause for demur now filed, and that being the case, in permitting the filing of this amended demurrer this court is not importing a new issue into it.

One of the pertinent inquiries to be made by this court as a preliminary to the allowing of this amendment is whether its allowance will prejudice or injure the respondent. Clearly it will not and cannot do so. The question being embraced within the original cause for demur, it has been fully considered in the briefs filed, and if necessary respondent could be given permission to file an additional brief.

The statute governs the rights and duties of railroad companies, and determines the amount of fare which they should pay, and if this statute is a condition of the existence of the respondent, it is certainly not prejudiced by being required to comply therewith, and by being compelled to carry passengers at the rate therein fixed; and it should not be permitted, by the raising of technicalities or by a slight imperfection in the pleading, to refuse to comply with the statute or delay a proceeding instituted for the purpose of compelling it so to do.

The statute in terms requires respondent to carry passengers at a particular rate, viz: two and one-half cents per mile. It refuses so to do. This proceeding was instituted to compel a compliance with the statute. An order was entered in the circuit court requiring such compliance. Under such circumstances it can hardly be assumed that the only rights and equities existing are those which exist in favor of the respondent. The public certainly have
71 rights in the premises and should be carried at the rate fixed in the statute. The refusal to permit this amendment might, in case it be decided that the respondent has not entered into a contract with the State, but that the provision in regard to rates constitutes a condition of its existence, necessitate additional proceedings in the circuit court and would permit the respondent to continue to require from the travelling public one-half cent per mile more than it is entitled to, amounting in the neighborhood of seventy-five or one hundred thousand dollars a year, until the question could again be brought to this court upon proper pleadings and determined.

The authority of the court to permit this amendment is ample. The case before the court is a mandamus case, brought up on certiorari. Of mandamus cases this *case* has both original and appellate jurisdiction, and in this case its original jurisdiction was concurrent with that of the circuit court. The case before this court is in the same condition, substantially, as though this court had taken original jurisdiction of the cause, and as the jurisdiction of the court in mandamus is plenary, it would have plenary authority to permit the amendment in question.

For the reasons stated I submit that this court should permit the filing of the amended demurrer as moved.

Respectfully,

HORACE M. OREN,
Attorney General.

(Endorsed:) Filed Jan. 15, 1902. Chas. C. Hopkins, clerk supreme court.

72 *Opinion.*

Supreme Court of Michigan.

CHASE S. OSBORN, Commissioner of Railroads,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY.

This is certiorari to review proceedings of the circuit court, in which a mandamus was issued, requiring respondent to reduce its fare. It appears that the respondent was organized as a corporation on the fifteenth of July, 1896, under the railway law then in force, which, in part 9 of sec. 9, 2 Comp. Laws 1897, sec. 6234, fixes the rate of fare of railroad companies whose passenger trains earn more than two thousand dollars per mile, at two and one half cents per mile. The respondent comes within this provision.

The respondent company was organized, however, by purchasers of the property of the Grand Rapids & Indiana Railroad Company, on foreclosure of a mortgage given on the first day of August, 1884. At the time this mortgage was given, the only limitation on the power to fix rates of fare was that it should not exceed three cents per mile.

It is the respondent's contention that, under 2 Comp. Laws 1897, sec. 6224, being section 2 of the railway act, it succeeded to all the rights and privileges of the Grand Rapids & Indiana Railroad Company. The answer states that the rate of fare of two and one half cents per mile is unreasonable and inadequate, and, as this statement is admitted by demurrer to the answer, it is the respondent's contention that such a provision would be invalid as against the original railroad company, and that, as the respondent has succeeded to the rights of the railroad company, it is equally invalid as to it.

The contention that a statute fixing unreasonable rates would constitute an impairment of the property rights of the old company, is based upon numerous decisions of the Federal Supreme Court, and of this court. The subject was discussed in Smith *v.* L. S. & M. S. R'y Co., 114 Mich. 460, and the rule was recognized in both
73 opinions in that case, that legislation, the effect of which is to deprive a corporation of its property, cannot be sustained under the power to alter, amend or repeal. See, also, Att'y Gen'l *v.* Looker, 111 Mich. 498; Detroit *v.* Plank Road Co., 43 Mich. 140.

And that the fixing of unreasonable rates is an infringement of property rights of an existing corporation, within the meaning of the fourteenth amendment, appears to have been determined by the Federal Supreme Court in C. & G. T. R'y Co. *v.* Wellman, 143 U. S. 339; Reagan *v.* Farmer's Loan & Trust Co., 154 U. S. 362; Covington & Lexington Turnpike Road Co. *v.* Sanford, 164 U. S. 578; Chic., Mil., & St. P. R'y Co. *v.* Minnesota, 134 U. S. 418; and L. S. & M. S. R'y Co. *v.* Smith, 173 U. S. 684.

The question in this case, however, is whether the defendant corporation stands in the same position in this respect as would the original company have occupied, had there been no foreclosure. The briefs contain an elaborate discussion of the question as to how far and in what respect a charter or a law authorizing an incorporation is a contract. We do not find it necessary to discuss this question at length, for, in our view, it cannot admit of doubt that corporations formed under an existing law will not be heard to question the rates fixed by the statute. They cannot avail themselves of the provisions of the law which give them the right to do business, and disregard those provisions which are onerous. This was the view taken by this court in Jackson etc. Traction Co. *v.* Commissioner of Railroads, 87 N. W. Rep. 133, and has the support of authority in other jurisdictions. See Thompson on Corporations, sec. 5257, and cases cited.

The case turns upon the question of whether the respondent is in position to insist that it occupies precisely the same ground that the former corporation would, but for the foreclosure. 2 Comp. Laws 1897, sec. 6224, provides that, "in case of the foreclosure and sale of any railroad or any part of any railroad, under any trust deed or mortgage, * * * it shall be competent and lawful for the parties who may become purchasers and such others as they
74 may associate with themselves, to organize a corporation for the management of the same, and issue stock in the same in shares of one hundred dollars each, to represent the property in said railroad; *and such corporation, when organized, shall have the same rights, powers and privileges as are or may be secured to the original company, whose property may have been sold under and by virtue of such mortgage or trust deed.*"

The section then provides for a declaration or certificate of the purchasers at the sale, setting forth the description of the property, etc., the amount paid, and the stockholders to whom stock is to be issued, which shall be addressed to the secretary of state, and proceeds,—

"And being filed and recorded in his office, the said corporation shall become complete, *with all the powers and rights secured to railroad companies under this act, to all the provisions of which, and amendments thereto, it shall be subject.*"

When the mortgage in question was given, the section fixing the rates contained no limitation, except that they should not exceed three cents per mile.

It is contended that the legislature could not, by the amendment of 1889, enacted after the mortgage was made, withdraw from the bondholders the right to reorganize, except on condition of submitting to the rates fixed by the statute. This question would seem to depend upon whether the legislation affected the bondholders' remedy simply, or affected the right of property. It may be urged with some force that, if the legislature might prohibit any incorporation, except on the terms of acceptance of unreasonable rates, the bondholders would be remediless, and that the right to reorganize is, in

effect, a part of the mortgage contract, and that the rights and franchises of the debtor corporation vest in the purchaser, on reorganization. If this view be adopted, and particularly if it be said that the purchasers could not, except through the instrumentality of a corporation, conduct the business of the corporation, it would be difficult to say that the amendment affects the remedy merely. Its effect would be, under such construction, to cut off the remedy,
75 *pro tanto* at least; and, if the rates are so far unreasonable as to make the operation of the road a burden, the effect would be to cut off the remedy wholly, thus rendering the franchise valueless. This would be beyond the power of the legislature.

Mundy *v.* Munroe, 1 Mich. 68;
Cargill *v.* Power, 1 Mich. 369.

But is this the effect of the amendment? May it not be said that the rights and property of this corporation vested in the purchaser upon the foreclosure sale, and that, independent of any express statutory authority to operate, the purchaser was authorized to maintain his property rights, and to operate this railroad in accordance with the franchise of the original company, and under precisely the same conditions? If this be so, the authority to incorporate was not essentially a part of the property right, but was a privilege granted by the State, which might be withdrawn. This latter view is enforced by the fact that, under the constitution, the legislature possessed the power to alter, amend or repeal this statute; and by the further fact that, under section 2, as it has always existed, the right to reorganize by the purchaser at a foreclosure sale was limited by the provision that the corporation should be vested with the powers and rights secured to railroad companies under the act, *to all the provisions of which, and the amendments thereto, it should be subject.* More than this, the legislature possessed the power, under the constitution, to repeal the statute. It could do this one day before the reorganization, or the next day after. While, by this means, it could not cut off the mortgage, or divest the mortgagee of his property rights, it could deprive him of the *power of reorganization.*

We think the legislation was not unconstitutional, and the order of the circuit court is affirmed with costs.

R. M. MONTGOMERY.
C. B. GRANT.
J. B. MOORE.
FRANK A. HOOKER.

Long, J., did not sit.

(Endorsed:) Filed April 8, 1902. Chas. C. Hopkins, clerk supreme court.

76 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing on the eighth day of April in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Frank A. Hooker, chief justice. Joseph B. Moore, Claudius B. Grant, Robert M. Montgomery, associate justices.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, Respondent and Appellant. } No. 19043.

The record and proceedings in this cause having been removed to this court by writ of certiorari, issued to the circuit court for the county of Kent, and motion having been made by said relator for leave to file an amended demurrer is said cause, and after having heard the respective parties in regard thereto, by their respective attorneys, and the said motion, and certiorari and matters and proceedings therein having been examined and duly considered by the court, and it appearing to this court that the said amendment should be permitted, and that there is no error in the rulings and proceedings in said cause in said circuit court, therefore, leave is granted to file the said amended demurrer in this cause, and it is ordered that the said amended demurrer tendered by the said relator, be and stand as the demurrer herein, in all respects as if the same had been originally filed in the circuit court in said cause. It is further ordered and adjudged by the court that the order of the said circuit court for the county of Kent, granting a peremptory writ of mandamus herein, be and the same is hereby in all things affirmed, and that mandamus issue from said court in accordance therewith. And it is further ordered and adjudged that the relator recover of and from the respondent, his costs, to be taxed, and have execution therefor.

77 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Chase S. Osborn, commissioner of railroads of the State of Michigan, relator, and The Grand Rapids & Indiana Railway Company, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the

construction of a clause of the Constitution, or of a treaty, or
78 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondent as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

To the Supreme Court of the United States:

The execution of the foregoing writ of error appears by the transcript of record hereto attached.

Dated May 31, 1902

CHAS. C. HOPKINS,
Clerk Supreme Court of Michigan.

[Endorsed:] Writ of error 19043 Filed May 5, 1902 Chas. C. Hopkins, clerk.

79 UNITED STATES OF AMERICA, *ss:*

To Chase S. Osborn, commissioner of railroads of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Michigan wherein The Grand Rapids & Indiana Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said

writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this second day of May, in the year of our Lord one thousand nine hundred and two.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

On this 7th day of May, in the year of our Lord one thousand nine hundred and two, personally appeared Arthur C. Sharpe before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Horace M. Oren attorney general of the State of Michigan and attorney for Chase S. Osborn within named in the suit therein mentioned by leaving the same in the office of the attorney general in the State capitol Lansing Mich. with Roger Q. Wykes assistant to the attorney general.

ARTHUR C. SHARPE.

Sworn to and subscribed the 7th day of May, A. D. 1902.

[Seal of Frank L. Danforth, Notary Public, Kent Co., Mich.]

FRANK L. DANFORTH,
Notary Public, Kent County, Mich.

[Endorsed:] 19043 Filed May 14, 1902 Chas. C. Hopkins, clerk

80 (*Copy of Bond.*)

In the Supreme Court of the State of Michigan.

CHASE S. OSBORN, Commissioner of Railroads, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY (a Corporation), Respondent.

Know all men by these presents, that we, the Grand Rapids & Indiana Railway Company, a corporation organized under the laws of the State of Michigan and Indiana, having its principal offices in the county of Kent in the State of Michigan, as principal, and Thomas J. O'Brien and William R. Shelby, both of the city of Grand Rapids, in said county of Kent, as sureties, are held and firmly bound unto Chase S. Osborn, commissioner of railroads of the State of Michigan, the relator above named, in the sum of one thousand dollars ($1000) to be paid to the said relator, his successors or assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the second day of May, A. D. 1902.

Whereas, the above named respondent has sued out a writ of

error to the Supreme Court of the United States to reverse the judgment of the supreme court of the State of Michigan, dated April 8, 1902, in the above entitled cause that peremptory writ of mandamus issue to compel the respondent to reduce the passenger fares on its railroad to two and one-half cents per mile.

Now therefore, the condition of this obligation is such that if the Grand Rapids & Indiana Railway Company above named shall prosecute said writ to effect and answer all damages and costs, if it shall fail to make good its plea, then the above obligation shall be void, otherwise to remain in full force and virtue.

[SEAL.] THE GRAND RAPIDS & INDIANA RAILWAY COMPANY.

By W. R. SHELBY, *Vice President.* [L. S.]
W. R. SHELBY. [L. S.]
T. J. O'BRIEN. [L. S.]

Attest:

R. R. METHEANY, *Secretary,*
Per W. E. NEAHR.

Approved.
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

81 STATE OF MICHIGAN, } ss:
County of Kent, }

W. R. Shelby being duly sworn deposes and says that he is one of the sureties in the foregoing bond; that he is the owner of real and personal estate situate in the city of Grand Rapids in said county of Kent in his own name unencumbered and not exempt from execution of the value of five thousand — ($5000) and upwards and that he is the owner of property in said county of Kent of the value of five thousand dollars ($5000) over and above all debts, liabilities and exemptions.

W. R. SHELBY.

Subscribed and sworn to before me this 29th day of April, A. D. 1902.

[SEAL.] HENRY F. SCHEIMAN,
Notary Public in and for Kent County, Michigan.

STATE OF MICHIGAN, } ss:
County of Kent, }

Thomas J. O'Brien, being duly sworn deposes and says that he is one of the sureties in the foregoing bond; that he is the owner of real estate situate in the city of Grand Rapids in said county of Kent in his own name unencumbered and not exempt from execution of the value of five thousand dollars ($5000) and upwards and that he is the owner of property in said county of Kent of the value of five

thousand dollars ($5000) over and above all debts, liabilities and exemptions.

T. J. O'BRIEN.

Subscribed and sworn to before me this 29th day of April, A. D. 1902.

[SEAL.] HENRY J. BENNETT,
Notary Public in and for Kent County, Michigan.

(Endorsed:) Filed May 5, 1902. Chas. C. Hopkins, clerk.

82 Supreme Court of the State of Michigan.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY (a Corporation), Respondent.

Assignment of Errors.

Now comes the said respondent and files herewith its petition for a writ of error and says that in the final order and judgment of the supreme court of the State of Michigan and in the records and proceedings in the above-entitled cause, there were errors, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment.

I.

The supreme court of Michigan erred in its final judgment, that the order of the circuit court for the county of Kent, granting a peremptory writ of mandamus herein, be in all things affirmed, and that mandamus issue from said circuit court in accordance therewith to compel the respondent to reduce the passenger fares on its railroad to 2½ cents per mile, the rate fixed by a statute of the State of Michigan, against the objections of respondent in its answer to the petition and order to show cause, that the statute and the enforcement thereof by peremptory mandamus are for reasons therein stated in violation of the provision in the Constitution of the United States, that no State shall deprive any person of property without due process of law.

83 II.

And in over-ruling respondent's objection (in paragraph I in its answer) that the provisions in the constitution of the State of Michigan and in the statute of Michigan as construed by the supreme court, are in violation of the said provision in the Constitution of the United States, for the reasons therein stated. That the State constitution provides that the legislature may establish reasonable maximum rates of passenger fares, and the statute fixes said rates at 2½ cents

per mile, and the supreme court have held that the legislature is the final judge of what are reasonable maximum rates, and that the reasonableness of rates fixed by the legislature is not subject to review or inquiry in the courts.

III.

In over-ruling respondent's objection (in paragraph II in its answer), that the said statute in its terms and as construed, is in violation of the provisions in the Constitution of the United States, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, for the reasons stated in said paragraph, that it imposes the said rate upon railway companies arbitrarily and finally, without any provision for any inquiry or proceeding to ascertain and determine whether such rate in any case is reasonable or not, and the courts of the State enforce said rate by peremptory writ of mandamus based upon the statute itself.

IV.

In over-ruling the objection of the respondent (in paragraph III in its answer), that the said rate is and would be inadequate, unreasonable and unjust and would not be adequate or reasonable compensation for such transportation upon the railroad of the respondent and that the enforcement of such rate upon the respondent
84 by peremptory mandamus, without any inquiry or determination as to the reasonableness thereof, would be to deprive the respondent of its property without due process of law in violation of said provision in the Constitution of the United States.

V.

In over-ruling the objection of the respondent (in paragraph IV in its answer), that the enforcement of said rate upon it, would be to deprive the respondent of its property, without due process of law, in violation of the Constitution of the United States, predicated of the facts stated in the answer and admitted by the demurrer thereto to be true, that said rate would not be adequate or reasonable compensation for such transportation and that it would reduce materially and not less than $75,000.00 per year (computed on the business of 1900) the gross earnings from the operation of its railroad, which do not now yield a fair income and profit upon the capital invested, over and above expense of operation, economically conducted, and would deprive it to that extent of moneys and income to which it is fairly and reasonably entitled from the use of its property, for such transportation, and would in many instances be less than the actual cost of running the trains to afford such transportation, and of the facts stated in paragraph VII, fully and in detail as to the property and the cost thereof to the respondent, and the interest bearing indebtedness, and as to the total earnings of the railroad and the capital stock, and that the total earnings for 1900 were $2,862,069.36,

and that the surplus thereof over operating expenses, interest on debt and other charges was $83,475.11, and that the reduction of passenger fares to 2½ cents per mile would reduce the earnings $78,489.00 per annum, and that the effect of this on the basis of the business of 1900, in which the earnings were greater than in any former year, would be to very nearly leave no surplus whatever and practically make the stock worthless.

85

VI.

In over-ruling the objection of respondent (in paragraph V in its answer), that the said statute as construed operates as a regulation of commerce among the States, in violation of the provision in the Constitution of the United States, which vests in Congress exclusive power to regulate such commerce, for the reasons stated in said paragraph, that respondent's railroad is an interstate road, that a large part of its said earnings is derived from interstate business, that the statute imposes the 2½ cent rate upon companies, the earnings of whose passenger trains exceed $2,000.00 per mile of road operated, that the supreme court of Michigan has decided that earnings, for the purposes of said statute, must include the so-called Michigan proportion of interstate fares and earnings, and that excluding earnings from interstate business, the earnings of passenger trains on respondent's road would be less than $2,000.00 per mile of road operated.

VII.

In over-ruling and denying the prayer of respondent in its petition for certiorari that the said order of the circuit court for the county of Kent be reversed and declared to be void, for the reasons therein fully stated, that the statute and the order are in violation of the said provisions in the Constitution of the United States.

VIII.

(This statement is introduced to make plain on their face the assignments of error which follow.)

The respondent is a corporation formed by the purchasers of the property at a sale June 10, 1896, under decree on the foreclosure of a mortgage made by another corporation owning the property August 1, 1884, when the rate allowed by the law was 3 cents

86 per mile, under a statute of Michigan then and still in force, which provided that railroad companies should have power to borrow money and to issue their bonds and to mortgage their corporate property and franchises to secure the payment of the same, and that in case of the foreclosure and sale of any railroad under a mortgage, it should be competent and lawful for the purchasers and such others as they might associate with themselves to organize a corporation for the management of the same, by filing a certificate with the secretary of state, and that such corporation when organized, should have the same rights, powers and privileges

as were secured to the original company, whose property was sold under the mortgage (sect. 38 article II and sect. 2 article I, general railroad law of 1873). The right under the Constitution of the United States to a reasonable compensation for its use was attached to the property at the time of the mortgage and inseparable therefrom and the right to object to reduction thereafter by statute, of the fares, to an unreasonable rate, if attempted, was then one of the rights and franchises of the corporation making the mortgage.

In 1889 the amendment to sect. 9 article II, general railroad law, reducing the fare to 2½ cents was passed, without any amendment or modification of the other sections.

June 10, 1896 the railroad property was sold on the mortgage.

July 11, 1896 the purchasers filed the certificate for incorporation under sect. 2 article II.

The purchasers of the property on the sale under the mortgage became vested with all the constitutional rights which the corporation making the mortgage would have.

The respondent corporation, formed by the purchasers at the mortgage sale, became vested (as respondent contends) with all the rights of the company which made the mortgage.

87 That company, if still owning the property, could resist the enforcement of the provision reducing the rate to 2½ cents in the amendment of the statute in 1889 and the answer and objections of the respondent in this case, if the suit were against the old company, would be sustained. (The supreme court of Michigan in its opinion in this case expressly so decided.)

The answer in paragraph VII*a* states fully the facts of the mortgage, the sale, the filing of the certificate by the purchasers, &c.

The relator filed a demurrer to the answer, that the same is not sufficient in law for the reason that upon its incorporation in 1896 under the general railroad law, the respondent entered into and became a party to a contract with the State of Michigan, one of the conditions of which was the agreement on its part to carry all passengers at the rate fixed by section 9 of said general railroad law, under which it is incorporated.

The circuit court sustained the demurrer and ordered that writ of mandamus issue.

The supreme court in its final judgment granted the relator leave to file an amended demurrer in the supreme court, and ordered that the same stand as the demurrer herein, as if originally filed in the circuit court.

The amended demurrer is the same as the demurrer filed in the circuit court, with the addition of the statement "2. That upon its incorporation in 1896, under the general railroad law, the said respondent became subject to that law, and the provision therein requiring it to carry passengers at the rates fixed in section 9 of that law; said provision in regard to rates being one of the conditions of the existence of respondent."

The supreme court having made the order, as stated, as to the

amended demurrer, rendered its judgment in the same order
88 that the order of the circuit court granting a peremptory writ of mandamus herein, be in all things affirmed and that mandamus issue from said court in accordance therewith.

The order of the circuit court was that the respondent by its incorporation, under the general railroad law, entered into a contract with the State to carry passengers at the rate fixed in section 9, and that the demurrer of the relator be sustained, and that a peremptory writ of mandamus issue as prayed.

The right to a fair and reasonable compensation for the use of its property contended for by respondent, is one guaranteed by the Constitution of the United States and respondent's objection to the enforcement upon it of the unreasonable rate of fare which would destroy all profit in the use of its property and deprive it of its property, is based upon the provision in the Constitution of the United States, and upon the claim that the Michigan statute itself and the proposed enforcement under it of the rate, are repugnant to and in violation of that Constitution.

These rights are denied to respondent by the opinion and judgment of the supreme court of Michigan, because of respondent's incorporation, for the reasons stated in the demurrer to respondent's answer, and it has been held by that court that these rights and objections, which it is conceded would otherwise be valid cause against the mandamus, are defeated as to respondent by its incorporation in the manner and according to the facts stated.

IX.

The supreme court of Michigan erred in affirming the order of the circuit court, that the demurrer interposed by the relator to the answer of the respondent, be sustained.

X.

And in affirming the order of the circuit court, that the respondent by its incorporation under the general railroad law
89 of the State of Michigan entered into a contract with the State to carry passengers at the rate fixed in section 9 of said law.

XI.

And in affirming the order of the circuit court, so as to sustain the amended demurrer of the relator as allowed to be filed in the supreme court.

XII.

And in deciding and holding by its order sustaining the demurrer to the answer, that the valid objections of the respondent therein, that the provisions in the constitution and statute of Michigan, as construed by the supreme court of Michigan, were repugnant to the Constitution of the United States, and that the rate of 2½ cents per mile is unreasonable and that the enforcement thereof on the re-

spondent would deprive the respondent of its property without due process of law, in violation of the Constitution of the United States, are nullified as to the respondent, and that the respondent is precluded from the benefit of them by the fact that it became incorporated, in the manner and according to the facts shown by the pleadings.

XIII.

And in the decision expressed in its opinion filed in this suit, that the respondent is not entitled to the rights under the Constitution of the United States, which the company making the mortgage would have, to resist the enforcement upon it of the 2½ cent rate, shown by the answer and admitted by the demurrer to be unreasonable, and so to be deprived of its property without due process of law, in violation of the Constitution of the United States, and that the order of the circuit court should be affirmed.

XIV.

And in sustaining the amended demurrer to respondent's answer and thereby holding and deciding that respondent,
90 by its incorporation in 1896 in the manner and according to the facts which appear in the record, is precluded from insisting upon its right under the Constitution of the United States, to a fair and reasonable compensation for the use of its property and from insisting that the provisions in the constitution and statute of Michigan relating to passenger fares as construed by the supreme court of the State, are invalid because repugnant to the Constitution of the United States, and from objecting to having enforced upon it by peremptory mandamus the statutory rate shown and admitted to be unreasonable, and being thereby deprived of its property, without due process of law, in violation of the Constitution of the United States.

XV.

And in sustaining the demurrer to respondent's answer, and thereby ruling and deciding that the provision in the statute of Michigan relating to the 2½ cent rate, because of respondent's incorporation, controls respondent's rights in its property to the exclusion of its rights therein, guaranteed by the Constitution of the United States.

XVI.

And in holding and deciding by its order sustaining the demurrer, that corporations organized under State laws are bound by provisions in those laws, which are repugnant to the Constitution of the United States and to the enforcement thereunder of rates of compensation for the use of their property which are unreasonable, and the enforcement of which would deprive them of their property, without due process of law, in violation of the Constitution of the United States.

XVII.

And in holding and deciding by its order sustaining the demurrer, that the respondent by its incorporation in 1896 is precluded from the objection that the statute of Michigan, as construed by
91 the supreme court of the State in a decision in 1900, after respondent's incorporation, is in violation of the provision in the Constitution of the United States, which vests in Congress exclusive power to regulate commerce among the States.

XVIII.

It appears that when the respondent was incorporated in 1896, the provision as to the 2½ cent rate was not operative as to its business. The supreme court of Michigan in sustaining the demurrer to respondent's answer, erred in holding and deciding that the respondent is precluded by its incorporation under the general railroad law, from thereafter objecting that the rate is unreasonable, and that its enforcement upon the respondent would be to deprive it of its property without due process of law, in violation of the Constitution of the United States, when it should be attempted to enforce the rate upon the respondent.

XIX.

The supreme court of Michigan erred in deciding and holding that the rights of respondent, to be determined in this proceeding, are governed by that provision in the law, under which it is incorporated, which limits the rates of passenger fares to 2½ cents, and not by the other provision in the same law, that a corporation organized by purchasers of railroad property on sale under mortgage, shall have the same rights, powers and privileges as were or might be secured to the original corporation, whose property was sold under such mortgage, thereby enforcing against the property rights of respondent a statutory provision repugnant to the Constitution of the United States and an unreasonable rate of fare and depriving respondent of its property without due process of law, in violation of the Constitution of the United States.

92 XX.

The supreme court of Michigan erred in its final order, that the relator have leave to file the amended demurrer, introducing the additional ground of demurrer, and that the amended demurrer stand as the demurrer herein, as if originally filed in the circuit court, and that the order of the circuit court sustaining the demurrer be affirmed.

(*a.*) The additional ground of demurrer is erroneous in law as an answer to the respondent's objections against the constitutionality of the Michigan statute and its enforcement.

(*b.*) The supreme court of Michigan had no power on certiorari to allow such amendment against the objections filed by respondent.

(*c.*) The question presented by said demurrer was not in the record when the case was submitted to the supreme court for decision, the amendment was not allowed until the final order of the supreme court was made, and the respondent was thereby denied a hearing upon said question.

93 For which errors, the respondent, The Grand Rapids & Indiana Railway Company, prays that the final order and judgment of the supreme court of the State of Michigan made and entered on the 18th day of April, 1902, dated 8th day of April, 1902, be reversed, and that the petition of the relator be dismissed.

Dated April 21, 1902.

T. J. O'BRIEN,
Attorney for Respondent.

94 [Endorsed:] No. 19043 In the supreme court of Michigan Chase S. Osborn, com'r of railroads, relator *vs.* G. R. & I. R'y Co. respondent Assignments of error and prayer for reversal. Filed May 5, 1902 Chas. C. Hopkins clerk T. J. O'Brien, attorney at law, 903 Mich. Trust Co. bldg., Grand Rapids, Mich. For ——
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95 Supreme Court of the State of Michigan.

CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Relator,
vs.
THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Respondent and Appellant.

STATE OF MICHIGAN, } *ss:*
In the Supreme Court, }

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, citation with proof of service endorsed thereon, a copy of the bond to the adverse party, duly approved, and the assignment of errors and prayer for reversal in the Supreme Court of the United States.

Seal of the Supreme Court of Michigan, Lansing.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this thirty-first day of May in the year of our Lord one thousand nine hundred and two.

CHAS. C. HOPKINS,
Clerk of Supreme Court of the State of Michigan.

Endorsed on cover: File No. 18,572. Michigan supreme court. Term No. 61. The Grand Rapids & Indiana Railway Company, plaintiff in error, *vs.* Chase S. Osborn, commissioner of railroads of the State of Michigan. Filed June 2nd, 1902.